Supreme Court, U.S.
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No. 96-

In The Supreme Court of the United States

October Term, 1996

Richard Dirk Selland,
Petitioner,

v.

William J. Perry,
Secretary of Defense,
John H. Dalton,
Secretary of the Navy,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the government's so-called "Don't Ask, Don't Tell" Policy, which allows the United States Navy to discharge an officer solely on the basis of homosexual orientation and not misconduct, violates the equal protection guarantee of the Fifth Amendment.

2. Whether the government's "Don't Ask, Don't Tell" Policy, which allows the United States Navy to discharge an officer based solely on a statement disclosing his sexual orientation made in private to his chaplain and commanding officer, violates the First Amendment.

3. Whether the government's "Don't Ask, Don't Tell" Policy, which equates speech with conduct and imposes an irrebuttable presumption of future misconduct on a service member who discloses a homosexual orientation, violates the due process clause of the Fifth Amendment, the First Amendment and the Administrative Procedures Act.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED	2
STATEMENT	2
A. Enactment of the Policy	2
B. Facts	4
REASONS FOR GRANTING THE PETITION	11
I. THE INCONSISTENT TREATMENT ACCORDED THE POLICY BY COURTS AND THE INCREASE IN PROSECUTIONS BY THE MILITARY UNDER THE POLICY WARRANT THE COURT'S INTERVENTION	11
II. FUNDAMENTAL CONSTITUTIONAL ISSUES ARE RAISED IN THIS CASE AND THE REASONING OF THE COURT OF APPEALS IN THE *THOMASSON* DECISION IS ERRONEOUS	14
CONCLUSION	24

TABLE OF AUTHORITIES

CASES — Page

Able v. United States, 880 F. Supp. 968 (E.D.N.Y. 1995), *modified*, 88 F.3d 1280 (2d Cir. 1996) 23
Able v. United States, 88 F.3d 1280 (2d Cir. 1996) 12
Brown v. Glines, 444 U.S. 348 (1980) 21
Cammermeyer v. Aspin, 850 F. Supp. 910 (W.D. Wash. 1994), *appeal dismissed as moot, sub nom. Cammermeyer v. Perry*, 97 F.3d 1235 (9th Cir. 1996) 12, 15
Chappell v. Wallace, 462 U.S. 296 (1983) 14
City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985) 14, 15
Dahl v. Secretary of the United States Navy, 830 F. Supp. 1319 (E.D. Cal. 1993) 12, 15
Emory v. Secretary of the Navy, 819 F.2d 291 (D.C. Cir. 1987) 14
Frontiero v. Richardson, 411 U.S. 677 (1973) 14
Goldman v. Weinberger, 475 U.S. 503 (1986) 14
Holmes v. California Army Nat'l Guard, 920 F. Supp. 1510 (N.D. Cal. 1996), *appeal pending*, No. 96-15726 (9th Cir.) .... *passim*
Jacobson v. United States, 503 U.S. 540 (1992) 20
Meinhold v. United States Dep't of Defense, 34 F.3d 1469 (9th Cir. 1994) 12, 13
Palmore v. Sidoti, 466 U.S. 429 (1984) 15
Powell v. Texas, 392 U.S. 514 (1968) 20
Pruitt v. Cheney, 943 F.2d 989 (9th Cir. 1991), *amended*, 963 F.2d 1160 (9th Cir.), *cert. denied*, 506 U.S. 1020 (1992) 14
Richenberg v. Perry, 97 F.3d 256 (8th Cir. 1996) .. 12
Robinson v. California, 370 U.S. 660 (1962) 20
Romer v. Evans, 116 S. Ct. 1620 (1996) 16
Rosenberger v. Rector & Vistors of the Univ. of Va., 115 S. Ct. 2510 (1995) 21
Selland v. Aspin, 832 F. Supp. 12 (D.D.C. 1993) 4, 5, 6
Texas v. Johnson, 491 U.S. 397 (1989) 21
Thomasson v. Perry, 80 F.3d 915 (4th Cir.) (en banc), *cert. denied*, 17 S. Ct. 358 (1996) .... *passim*

TABLE OF AUTHORITIES—Continued

	Page
United States v. Moreno, 413 U.S. 528 (1973)	15
United States v. Robel, 389 U.S. 258 (1967)	20
Watkins v. United States Army, 875 F.2d 699 (9th Cir. 1989), *cert. denied*, 498 U.S. 957 (1990)	20
Watson v. Perry, 918 F. Supp. 1403 (W.D. Wash. 1995)	12
CONSTITUTIONAL PROVISIONS	
U.S. Const. amend. I	2
U.S. Const. amend. V	2
STATUTES	
5 U.S.C. § 706	2, 22
10 U.S.C. § 654	*passim*
28 U.S.C. § 1254(1)	2
REGULATIONS	
Department of Defense Directive No. 1332.30	*passim*
MISCELLANEOUS	
29 Weekly Comp. Pres. Doc. 1369 (July 19, 1993)	16

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PETITION FOR A WRIT OF CERTIORARI

Richard Dirk Selland respectfully petitions the Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit entered in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., 1a) is not reported. The court of appeals' opinion is based solely on that court's prior *en banc* decision in *Thomasson v. Perry*, which is reported at 80 F.3d 915 (4th Cir.) (*en banc*), *cert. denied*, 17 S. Ct. 358 (1996) (App., 17a). The opinion of the district court in this matter is reported at 905 F. Supp. 260 (D. Md. 1995) (App., 3a). The

findings and recommendations of the Navy's Board of Inquiry (App., 102a) and the final decision of Respondent John H. Dalton, Secretary of the Navy, discharging the Petitioner, are unreported (App., 95a).

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The First and Fifth Amendments to the United States Constitution (App., 106a), relevant sections of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706 (App., 107a), Section 571 of the National Defense Authorization Act of 1994, 10 U.S.C. § 654 (App., 108a), and Department of Defense Directive No. 1332.30 (App., 114a), are all set forth in the appendix to this Petition.

STATEMENT

Petitioner challenges his involuntary discharge from the United States Navy under the so-called "Don't Ask, Don't Tell" Policy, which governs service of homosexual citizens in the United States Armed Forces.

A. Enactment of the Policy

On November 30, 1993, President Clinton signed the National Defense Authorization Act of 1994, which contained the so-called "Don't Ask, Don't Tell" Policy (the "Policy"). 10 U.S.C. § 654 (1994). App., 108a-113a. In codifying the Policy, Congress listed a panoply of purported rationales to support the Act. Among the findings set forth were the following:

> (13) The prohibition against homosexual conduct is a long-standing element of military law that continues

> to be necessary in the unique circumstances of military service.
>
> (15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654. App., 109a-110a. The Act purports to set forth a policy that mere homosexual orientation, standing alone, does not preclude induction into the armed forces or continued service. App., 110a-111a. Nonetheless, the Act further provides that a service member "shall be separated from the armed forces" if "the member has stated that he or she is a homosexual . . . or words to that effect." *Id.* A service member can escape discharge under these circumstances only if he or she proves that "he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654(b)(2). *Id.* While the Act defines a "homosexual" and "homosexual act," no definition is supplied for "propensity." *See* 10 U.S.C. § 654(f). App., 112a.

Pursuant to a Memorandum issued by then-Secretary Aspin, the Navy issued several directives to govern separations under the new policy. Directive 1332.30 explicitly states that homosexual orientation "is not a bar to continued service," but that "homosexual conduct" provides an adequate basis for dismissal from service. App., 122a. Unlike the Act, the Directives consider statements made by service members concerning homosexual orientation to be tantamount to homosexual conduct. Thus, any statement by a service member that "demonstrates a propensity or intent to engage in homosexual acts," constitutes homosexual conduct. *Id.* Under the Directive, a verbal admission of homosexual orientation—i.e., a statement that "I am gay"—constitutes an act requiring separation from

military service unless the accused service member rebuts a presumption that he or she engages or intends to engage in "homosexual acts" or has a propensity to do so. App., 120a-21a, 123a.

B. Facts

On January 21, 1993, then-LTJG Richard Dirk Selland, a commissioned supply officer on a fast-attack nuclear submarine, met privately with a Navy Chaplain and his commanding officer, Commander Karl M. Hasslinger. C.A. App. 10-11, 20, 261, 1274-75, 1279. The meeting was the result of prior counseling sessions between LTJG Selland and the Chaplain. LTJG Selland had sought the Chaplain's advice and guidance because he was struggling with issues concerning his sexual identity and had been the object of joking aboard the ship based on the widespread belief that he was gay. C.A. App., 10, 95-97, 1278-79. The frequency and intensity of the jokes had increased when then-candidate and now President Clinton publicly announced his intention to lift the ban on homosexuals serving in the United States military. *Id.* On the advice of the Chaplain and based on published reports that President Clinton would shortly lift the ban on military service of acknowledged homosexuals, LTJG Selland decided to discuss his sexual orientation in private with Commander Hasslinger in the hope that the commanding officer would exercise some leadership to curb the joking on board the ship. *Id.* During this private meeting, the Chaplain revealed to Commander Hasslinger that LTJG Selland was gay. C.A. App., 10-11, 200-220, 1279-80. Based on this information, Commander Hasslinger immediately ordered LTJG Selland off the ship. *Id.*

After receiving separation orders from the Navy, LTJG Selland filed suit in the United States District Court for the District of Columbia seeking to enjoin the Navy from discharging him. *See Selland v. Aspin*, 832 F. Supp. 12

(D.D.C. 1993). The district court granted LTJG Selland's request for a preliminary injunction, basing its decision, in part, on the circumstances in which LTJG Selland made his disclosure. As noted by the court, "[t]here is also an intangible, but meaningful, equity in the fact that plaintiff made the statement about his homosexuality not for broadcasting on television, but in the company of his Chaplain to his Commanding Officer in his stateroom." *Id.* at 16. After the present Policy was enacted, this suit was dismissed by agreement.

On March 28, 1994, pursuant to the new Policy, the Navy issued a new discharge notification to LTJG Selland. C.A. App., 291-93. The Notification stated that the Navy sought to discharge LTJG Selland "based on your statement that you are a homosexual, which is defined as homosexual conduct" under the Policy. C.A. App., 291. Under the Notice, LTJG Selland was given the opportunity to appear before a Board of Inquiry convened by the Navy. The Board's narrow charge was to determine whether LTJG Selland violated the Policy. No opportunity was afforded to challenge the constitutionality of the Policy.

The Board of Inquiry was convened on July 12, 1994. LTJG Selland introduced both written and testimonial evidence demonstrating his excellent performance record. This evidence included fitness reports issued during his time aboard the attack submarine that refer to him as "*THE EXPERT* in his field" (emphasis in original) and "an outstanding manager and organizer," with "unlimited growth potential," and recommend that Selland be detailed to "only the most demanding billets." C.A. App., 730. LTJG Selland also introduced statements from individuals with whom he had worked that averred that they either knew or suspected that LTJG Selland was gay and that this knowledge or suspicion had no impact on LTJG Selland's performance as a Navy officer. C.A. App., 503-04, 505, 770, 771-72.

The Board of Inquiry unanimously recommended that Petitioner be honorably discharged. In its Findings, the Board expressly stated that "we acknowledge LTJG Selland's competence and dedication to the Navy." App., 102a. At the same time, the Board ruled that such evidence was not "relevant" to its determination of whether LTJG Selland had violated the Policy. *Id.* The Board of Inquiry also echoed concerns first raised by the court in *Selland v. Aspin*, 832 F. Supp. 12, concerning the circumstances surrounding LTJG Selland's private disclosure of his sexual orientation. Specifically, in its Findings, the Board stated:

> The Board found the circumstances of LTJG Selland's statement to CDR Hasslinger troubling. We examined his assertion that his statement was made, at the urging of a Navy chaplain, in privacy, to his commanding officer, in order to stop wardroom harassment.

App., 103a. Despite this professed concern, the Board ruled that "LTJG Selland has failed to show cause for retention in the Naval service." App., 104a. LTJG Selland appealed the Board's ruling to the Navy Board of Review, which rejected his appeal. C.A. App., 145. On January 24, 1995, the Chief of Naval Personnel recommended that LTJG Selland be discharged. App., 95a. On March 13, 1995, the Secretary of the Navy approved LTJG Selland's discharge. App., 98a.

LTJG Selland filed the present action in the United States District Court for the District of Maryland on April 18, 1995, seeking a declaration as to the constitutionality of the Policy as applied to him. On April 26, 1995, the district court enjoined the Navy from discharging LTJG Selland for a period of six months, while the case was pending. Subsequently, the Navy moved for summary judgment, which was granted by the court on October 31, 1995. App., 5a. Relying almost

exclusively on the notion that federal courts should defer to the executive and legislative branches in "military decisions," the court rejected LTJG Selland's argument that the Policy violated the First Amendment. App., 6a-10a. Although the court conceded that LTJG Selland's discharge was due solely to his statements and that "the Policy will probably inhibit members from expressing their homosexuality," the court concluded that the Policy would have only "a secondary effect" or "incidental burden" on the First Amendment rights of servicemen and women. App., 7a.

The district court also rejected LTJG Selland's argument that the Policy violated the equal protection clause because it permits an otherwise outstanding service member to be discharged, not for any misconduct, but based solely on his or her status as a homosexual. App., 12a. Conducting its review under the rational basis standard, the court ruled that the Policy served a legitimate government interest "in the military context." App., 13a. Although the court conceded that the Policy "could be interpreted as imposing a sanction on homosexual status" and expressed doubt as to "what factors will rebut the presumption of 'propensity' to commit homosexual acts," nevertheless, the court found that the Navy's planned discharge of LTJG Selland did not amount to an unconstitutional sanction based on status. App., 10a-11a. The district court also rejected LTJG Selland's Due Process and Administrative Procedures Act arguments, finding that the Board of Inquiry proceedings fully complied with the Constitution and the APA. App., 14a-15a.

On November 13, 1995, LTJG Selland filed a timely notice of appeal. On November 7, 1996, the United States Court of Appeals for the Fourth Circuit issued an unpublished *per curiam* Order affirming the district court's decision granting summary judgment. App., 2a. The sole legal authority relied on by the Court of Appeals was its prior *en banc* decision in *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc), *cert. denied*, 17 S. Ct. 358 (1996). App., 2a.

Thomasson involved a Navy lieutenant who, after enactment of the Policy, sent a letter to four Navy admirals with whom he worked, stating that "I am gay," and expressing strong disagreement with the military's Policy. App., 20a-21a. After exhausting his military remedies, Thomasson brought an action in federal court in Virginia challenging the constitutionality of the Policy. App., 22a. The district court granted summary judgment to the Government and Thomasson appealed. After initially hearing Thomasson's appeal before a three-member panel, the Fourth Circuit *sua sponte* agreed to re-hear Thomasson's appeal *en banc*. On April 5, 1996, the court issued its decision and by a 9 to 4 vote, affirmed the district court's ruling. That decision generated four separate opinions and widely conflicting views among the judges as to operation of the Policy, which cannot be reconciled.

Chief Judge Wilkinson, writing for the majority, relied extensively on the notion that the judiciary should defer to the legislative and executive branches when confronted with questions of military affairs. App., 29a-32a. Given this deferential stance, the court rejected Thomasson's argument that the Policy must be subjected to heightened scrutiny. Instead, applying the more lenient "rational basis" standard, the court ruled that the Policy represented a "legitimate legislative choice" not violative of the equal protection clause. In reaching this conclusion, the court accepted, without question, the government's rationale that homosexual acts have a deleterious effect on morale, good order, discipline, and unit cohesion, as well as anecdotal testimony from former high-ranking military officers. App., 36a-37a. The court found that the presumption underlying the Policy that "declared homosexuals have a propensity or intent to engage in homosexual acts" had "a rational factual basis." App., 40a-41a. Finally, the court rejected the argument that the Policy treated declared and undeclared homosexuals any differently, as the statements made by the declared homosexuals were merely "affirmative evidence" of their intention to act in a prohibited fashion. App., 42a-46a.

The court likewise rejected Thomasson's First Amendment challenge to the Policy, dismissing the argument that the Policy targeted speech *per se*. Noting that the First Amendment rights of service personnel are more limited than civilians, the court ruled that the statute "does not target speech declaring homosexuality" but instead, "targets homosexual acts and the propensity or intent to engage in homosexual acts," presumably using speech only as evidence of such potential violations. App., 42a-43a. As the focus of the Policy was "propensity" and not speech, the Policy was not "a viewpoint-based or content-based regulation." App., 44a-46a. Finally, the majority rejected Thomasson's due process and APA claims, ruling that the presumption that declared homosexuals will engage in homosexual conduct is "rational" and that the administrative hearing and review accorded Thomasson fully complied with the requirements of the due process clause and the APA. App., 48a-49a.

Six of the judges who joined in the majority opinion also concurred in an opinion authored by Judge Luttig, which contradicted the majority opinion in several respects. Judge Luttig concluded that in promulgating the regulations, the Department of Defense exceeded the statutory authority granted by Congress and that the Administration's regulations, accordingly, should be "invalidated." App., 50a. In Judge Luttig's view, the statute is aimed at known homosexuals, not acts or conduct, and Congress plainly intended to bar all known homosexuals from service, including those who merely express a sexual orientation. App., 56a-59a. The directives, which permit an "individualized rebuttal of the presumption merely by proof that one is not likely to engage in homosexual acts," are invalid because they improperly "create[] a sanctuary for homosexuals within the military" Congress never intended. App., 50a. Although Judge Luttig ultimately found that the statute did not violate Thomasson's constitutional rights, at the same time, he, along with five

other judges, held that the regulation was "contrary to statutory mandate." App., 81a.

Judge Hall, joined by three other judges, strongly dissented from the majority opinion. Although the dissenting judges acknowledged that some deference should be accorded "to the professional judgment" of the military on military matters, no deference was acceptable as to "their judgment on things constitutional." App., 84a. Examining the underpinnings of the Policy, the dissent concluded that the statute was motivated by prejudice against homosexuals, which could never constitute a legitimate governmental interest. App., 86a-87a. Moreover, the dissent rejected the government's contentions that the need for "unit cohesion" outweighed any complaints that the statute codified intolerance and private biases. App., 87a-88a. Citing prior government studies that failed to identify any adverse impact of acknowledged homosexuals serving in the military and Lt. Thomasson's exemplary service record in the 15 months after his public disclosure, the dissent found no evidence that discharge of avowed homosexuals was essential to promote "unit cohesion." App., 88a.

The dissent similarly rejected the majority's ruling that the Policy complied with the guarantees established by the First Amendment. The use of speech as evidence, Judge Hall noted, is permissible but is besides the point. Since the express terms of the Policy provide that orientation "is not a bar to continued service," a statement as to orientation is evidence of nothing impermissible. App., 92a-94a. Instead, by projecting conduct from speech, the Policy "creates a classification *among homosexuals* based *solely* on speech." App., 92a (emphasis in original). Given the absence of evidence that declared homosexuals constitute a greater threat to military conduct than undeclared homosexuals, Judge Hall concluded that the Policy is simply targeted at suppressing selected speech, namely an unpopular sexual orientation. App., 92a-93a. This suppression, the dissent concluded, could not be permitted under the Constitution. *Id.*

REASONS FOR GRANTING THE PETITION

This case involves significant constitutional issues of far-reaching importance that warrant careful judicial scrutiny. Shorn of its legislative insulation and rhetorical trappings, the Policy does little more than codify private bias and prejudice. As such, the Policy does not further a legitimate governmental interest and is irrational. Moreover, the mechanism employed in the Policy to discharge acknowledged homosexuals—equating speech with conduct—imposes a broad and undifferentiated disability on a narrow band of American citizens because of their status and infringes on their fundamental right to free speech.

The present case is just one of many cases brought all over the country to protect the rights of servicemen and women barred from serving their country because of who they are. The lower courts have reached different results in interpretating both the Policy and its predecessor. Indeed, even the balkanized decision in *Thomasson,* far from resolving the constitutional questions, provides conflicting and contradictory interpretations that will only create greater uncertainty. Given the wholesale increase in the number of prosecutions by the military of homosexual service members, the Court should grant certiorari to clearly and definitively settle the constitutional questions surrounding the discriminatory policy.

I. THE INCONSISTENT TREATMENT ACCORDED THE POLICY BY COURTS AND THE INCREASE IN PROSECUTIONS BY THE MILITARY UNDER THE POLICY WARRANT THE COURT'S INTERVENTION.

The inconsistent treatment of the Policy by the court below in *Thomasson* is reflective of the general state of confusion as to the constitutionality of the Policy. Six judges in *Thomasson* ruled that the regulations underlying the Policy promulgated by the Department of Defense

exceed the statutory authority granted by Congress. App., 50a. Another four judges found that the Policy (including the regulations) is unconstitutional. App., 82a. Although the court upheld Thomasson's discharge, a clear majority of the judges in *Thomasson* found that the Policy is invalid in some form.

Other courts that have considered the constitutionality of the Policy have similarly reached conflicting conclusions. *Compare Holmes v. California Army Nat'l Guard,* 920 F. Supp. 1510 (N.D. Cal. 1996) (Policy unconstitutional under both First and Fifth Amendments), *appeal pending,* No. 96-15726 (9th Cir.), *with Richenberg v. Perry,* 97 F.3d 256 (8th Cir. 1996) (divided panel upholds discharge of Air Force officer who stated he was gay in order to terminate future military service); *Able v. United States,* 88 F.3d 1280 (2d Cir. 1996) (reversing district court's ruling on First Amendment and remanding matter for consideration of whether prohibition on homosexual acts was constitutionally valid); *Watson v. Perry,* 918 F. Supp. 1403 (W.D. Wash. 1996) (policy valid as applied to Navy officer who admitted homosexual conduct).

The uncertainty concerning the validity of the Policy is further compounded when decisions construing the constitutionality of the former policy are taken into account. *Cammermeyer v. Aspin,* 850 F. Supp. 910, 917 (W.D. Wash. 1994) (policy is rooted "solely in prejudice" and there is no empirical evidence to support exclusionary policy), *appeal dismissed as moot, sub nom. Cammermeyer v. Perry,* 97 F.3d 1235 (9th Cir. 1996); *Dahl v. Secretary of the United States Navy,* 830 F. Supp. 1319, 1332-33 (E.D. Cal. 1993) (policy "both effectuates and is solely motivated by prejudice against homosexuals" for which the court could not "conceive of any legitimate basis."). In *Meinhold v. United States Dep't of Defense,* 34 F.3d 1469, 1479 (9th Cir. 1994), the Ninth Circuit

upheld the general ban on service by homosexuals in the military but invalidated the policy as applied to a service member who simply stated, "I am in fact gay." In reaching this conclusion, the court noted that a policy requiring the discharge of homosexuals based on a " 'classification of being homosexual' clearly implicates equal protection." *Id.* at 1477. Moreover, the court questioned "whether it can ever be rational to presume that one class of persons (identified by their sexual preference alone) will violate regulations whereas another class (identified by their preference) will not." *Id.* at 1478. This observation, which applies with greater force to the present Policy, directly conflicts with that of the majority opinion in *Thomasson*. App., 41a. Given the disparate treatment accorded the Policy by federal courts, certiorari should be granted to clearly enunciate whether the Policy comports with the Constitution and federal law.

The present case represents one of many that has been brought in an effort to seek a judicial determination as to the constitutionality of the Policy. The number of such cases is likely to increase given the apparent wholesale increase of prosecutions under the Policy by the Department of Defense. In a recent report, one organization reported that in 1995, some 722 individuals were discharged from the armed forces, which represents a twenty-one percent increase over the prior year. *See* C.D. Osburn & M. Benecke, *Conduct Unbecoming: The Second Annual Report on "Don't Ask, Don't Tell, Don't Pursue" Violations,* ii (1996). Given that these cases will likely raise the same or similar constitutional questions, the Court should exercise its authority to determine whether the Policy violates the Constitution.

II. FUNDAMENTAL CONSTITUTIONAL ISSUES ARE RAISED IN THIS CASE AND THE REASONING OF THE COURT OF APPEALS IN THE *THOMASSON* DECISION IS ERRONEOUS.

A. Both lower courts largely avoided any constitutional scrutiny of the Policy under the guise of deference to the military, thus abdicating their constitutionally-mandated role of judicial oversight. As noted by this Court, "citizens in uniform may not be stripped of basic rights . . . because they have doffed their civilian clothes." *Chappel v. Wallace*, 462 U.S. 296, 304 (1983) (quoting Warren, The Bill of Rights and the Military, 37 N.Y.U.L. Rev. 181, 188 (1962)); *Emory v. Secretary of the Navy*, 819 F.2d 291, 294 (D.C. Cir. 1987) ("The military has not been exempted from constitutional provisions that protect the rights of individuals."). Indeed, the courts have been particularly hesitant to defer to "military judgment" where, as here, the military is alleged to have violated the Constitution's guarantee of equal protection. *See Frontiero v. Richardson*, 411 U.S. 677 (1973) (plurality opinion); *Pruitt v. Cheney*, 943 F.2d 989, 995 (9th Cir. 1991), *amended*, 963 F.2d 1160 (9th Cir.), *cert. denied*, 506 U.S. 1020 (1992); *Goldman v. Weinberger*, 475 U.S. 503, 523 (1986) (Brennan, J., dissenting) ("It is not the province of the federal courts to second-guess the professional judgments of the military services, but we are bound by the Constitution to assure ourselves that there exists a rational foundation for assertions of military necessity . . . ."). The context in which the Policy was adopted demands more, not less, judicial scrutiny of its constitutional validity.

B. The Policy violates the equal protection guarantee because it is based solely on private biases and prejudice, against a minority class of citizens. In order to satisfy a rational basis standard of review, a government policy must serve a legitimate governmental purpose and must be rationally related to achieving that purpose. *City of*

Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985). The Court has explicitly rejected the principle that discrimination based solely on fear or prejudice can withstand any level of constitutional scrutiny. *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984) (Court observing that while Constitution cannot control "the reality of private biases . . . neither can it tolerate them."); *Cleburne Living Ctr., Inc.*, 473 U.S. at 446-47 ("[S]ome objectives—such as 'a bare . . . desire to harm a politically unpopular group'—are not legitimate state interests.") (quoting *United States v. Moreno*, 413 U.S. 528, 534 (1973)).[1] Even President Clinton himself has acknowledged that the prior absolute ban on service by known homosexuals was based, not on any legitimate governmental interests, but on private biases.[2] "[T]hose who oppose lifting the ban are clearly focused not on the conduct of individual gay service members, but on how

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[1] A number of lower federal courts likewise have ruled that the military's exclusionary policies toward homosexuals are steeped in personal bias and prejudice. *Holmes v. California Army Nat'l Guard*, 920 F. Supp. 1510, 1532 (N.D. Cal. 1996) (court "rejects the notion that the bigotry of . . . service members provides a constitutionally sufficient basis to banish an entire class of persons from the military."); *Cammermeyer v. Aspin*, 850 F. Supp. at 922 (policy is rooted "solely in prejudice" and there is no empirical evidence to support exclusionary policy); *Dahl v. Secretary of the United States Navy*, 830 F. Supp. at 1332-33 (policy "both effectuates and is solely motivated by prejudice against homosexuals" for which the court could not "conceive of any legitimate basis.").

[2] Other architects of the military policies on homosexuals have likewise testified that bias is the basis for the policies. Lt. Gen. John P. Otgen, who chaired the Military Working Group that initially formulated the current Policy, has testified that the anticipated breakdown in unit cohesion occurs because of prejudice or fears that heterosexual service members hold toward homosexuals. *Cammermeyer v. Aspin*, 850 F. Supp. at 922. Similarly, Edwin Dorn, a former Assistant Secretary of Defense under which the DoD Directives implementing the policy were issued, testified that "as with racial desegregation of the military, much of the resistance to gays is grounded in fear and in prejudice." *Id.* at 925 (citation omitted).

non-gay service members feel about gays in general and in particular those in the military service." Remarks Announcing The New Policy On Gays And Lesbians In The Military, 29 Weekly Comp. Pres. Doc. 1369, 1371 (July 19, 1993). As this Court has previously held, the incorporation of private prejudices into a legislative act can never be rational or tolerated by the Constitution.

This Court's recent decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), is instructive on this point. In *Romer*, Colorado citizens approved an amendemnt to the Colorado Constitution that prohibited any state office, department, agency or municipality from enacting, adopting, or enforcing a statute whereby homosexuals would be entitled to claim minority or protected status. *Id.* at 1623. The state sought to justify the amendment before the Court by arguing that it "puts gays and lesbians in the same position as all other persons." *Id.* at 1622. Despite this argument, this Court ruled that the amendment violated the guarantee of equal protection because it imposed "a broad and undifferentiated disability on a single named group," and such breadth was "inexplicable by anything but animus toward the class that it affects." *Id.* at 1627. Noting that " 'a bare . . . desire to harm a politically unpopular group cannot constitute a legitimate governmental interest,' " the Court held that the amendment violated the equal protection clause." *Id.* at 1628 (citation omitted).

The present Policy explicitly targets homosexuals for discharge from the military, based solely on their status. Discharge may be accomplished even in the absence of prohibited conduct, a sanction that does not apply to other service members. Moreover, the driving force behind enactment and enforcement of the Policy is not the misconduct of its targets, but "animosity toward the class of persons affected." *Romer*, 116 S. Ct. at 1628. Under the Court's prior rulings, the attempt to harm a politically unpopular group cannot constitute a legitimate governmental interest.

C. The primary argument in favor of this exclusionary Policy is that homosexuality is incompatible with military service and that the presence of homosexuals in the armed forces will destroy morale, discipline, good order, and unit cohesion.[3] In order to safeguard these objectives, the Policy permits the armed forces to discharge a service member even in the absence of misconduct. The Policy rests on unsupported assumptions, speculations and stereotypes.

It is not rational to assume that those service members who acknowledge their homosexuality will necessarily engage in prohibited conduct.[4] No such presumption exists that heterosexual military personnel will violate military codes of conduct governing their personal behavior.

Moreover, although the Policy allegedly protects the personal privacy interests of servicemen and women, reduces sexual tension in a unit, and avoids unit polarization, App., 40a-42a, there is no evidence that the Policy truly will accomplish any of these objectives. For ex-

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[3] The legislative record for the Policy fails either to acknowledge or address the undisputed fact that in times of recent conflict—from World War II to the Operation Desert Shield/Desert Storm—the U.S. military has suspended its ban on military service by homosexuals. This inconsistency was highlighted in a 1993 Congressional Research Service report: "By deploying homosexuals with their units [in times of war], the services bring into question their own argument that the presence of homosexuals seriously impairs the accomplishment of the military mission. In no other situation are a lack of privacy, the need for cohesion and morale, and the integrity of the system of rank and command more compelling than in time of war." David F. Burelli, *CRS Report for Congress: Homosexuals and U.S. Military Personnel Policy* (1993). C.A. App., 1165, 1208.

[4] *See Declaration of Dr. Gregory M. Herek*, C.A. App. 790, 794 ("No data exist to indicate that lesbians and gay men are less capable than heterosexuals of controlling their sexual or romantic urges . . . ."); *Report of Mady W. Segal*, Ph.D., C.A. App. 1317, 1321 ("Proper enforcement of current rules of sexual conduct will successfully control homosexual behavior in the same way it currently controls heterosexual conduct.").

ample, the Policy explicitly permits the continued service of homosexuals provided they do not acknowledge their orientation or engage in prohibited conduct. Accordingly, heterosexuals still face a risk that they will be required to share quarters with individuals who they may believe, but do not know, to be gay. In fact, as one court has noted, the Policy-mandated silence could well increase "tension and suspicion" among military personnel. *Holmes*, 920 F. Supp. at 1532. It is also difficult to understand how the conduct the Policy permits—going to a gay bar, possessing or reading homosexual publications, associating with other homosexuals, and marching in a gay parade—and the action it forbids—confessing one's sexual orientation—further the objective of preventing unit polarization. App., 141a-142a. That the Policy limits its reach to plain speech is irrational.

The record in this matter clearly demonstrates that LTJG Selland's orientation had no impact on his job performance. In fact, he continued to serve successfully in the military for three and one-half years after his disclosure.[5] Even the Board of Inquiry praised LTJG Selland for his competence and commitment to the Navy. App., 102a. LTJG Selland's successful integration is not surprising. The government's own studies conducted over several years have demonstrated conclusively that sexual orientation has no impact on performance in the military services.[6]

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[5] At the Navy Board of Inquiry, LTJG Selland introduced nearly a dozen declarations of Navy and civilian personnel with whom he worked both before and after his private disclosure, all of which attested to the fact that his sexual orientation had no impact on his job performance. C.A. App. 503-504, 505, 770, 771-72.

[6] Former Secretary of Defense Aspin commissioned the RAND Corporation to conduct an in-depth study concerning the military's ban on service by homosexuals. The exhaustive 500-page report concluded that conduct and not orientation should be the key factor in determining suitability for service. *See Sexual Orientation and U.S. Military Personnel Policy: Options and Assessment*, National

In contrast, as the majority opinion in *Thomasson* makes clear, the only evidence to support the exclusionary policy is anecdotal testimony of active or retired military personnel that the presence of known homosexuals would tear apart the fabric of military life, testimony that largely gives voice to personal prejudice. App., 38a. Other candid testimony revealed that damage to unit cohesion or morale had nothing to do with the homosexual service member, but was the result of private biases harbored by his or her heterosexual colleagues. *See* note 5, *supra*. Accordingly, the Policy requires exclusion of homosexuals because some heterosexuals find their presence in a military unit intolerable. It is difficult to conceive of a Policy that more effectively rests on private prejudices.[7]

Defense Research Institute (RAND) (C.A. App., 1094, 1103) ("That policy would consider sexual orientation, by itself, as not germane to determining who may serve in the military. The policy would establish clear standards of conduct for all military personnel, to be equally and strictly enforced, in order to maintain discipline necessary for effective operations."). Similarly, a report by the General Accounting Office concluded that DoD officials conceded that the military ban on homosexuals was "not based on scientific or empirical data,"and that the DoD did "not contend that homosexuals cannot or do not perform as well on the job as heterosexuals." GAO, *Defense Force Management: DoD's Policy On Homosexuality*, (1992) (C.A., 921, 948). Two other DoD-commissioned reports explicitly rejected any connection between homosexuality and performance in the military. *See* Theodore R. Sarbin & Kenneth K. Eoyang, *Nonconforming Sexual Orientation And Military Suitability*, (1988) (C.A. App., 591) ("Studies of homosexual veterans make clear that having a same-gender or an opposite-gender orientation is unrelated to job performance in the same way as being left- or right-handed."); Michael A. McDaniel, *Preservice Adjustment Of Homosexual and Heterosexual Military* Accessions, (1989) (C.A., App. 1242, 1269) ("[T]he preponderance of the evidence presented indicates that homosexuals show preservice suitability adjustment that is as good or better than the average heterosexual.").

[7] The justifications put forth in support of the Policy—which have no empirical evidence and are largely based on the perceptions

D. This Court has ruled that improper or illegal conduct cannot be presumed based on a person's status. In *Robinson v. California*, the Court rejected as unconstitutional a California statute that permitted narcotic addicts to be punished not for their use of illegal substances, but because the statute made "the 'status' of narcotic addiction a criminal offense." 370 U.S. 660 (1962). The *Robinson* principle has been reaffirmed in other decisions. *Jacobson v. United States*, 503 U.S. 540, 551-52 (1992) (predisposition to act in a certain manner cannot support inference that a person will commit crimes in the future); *Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring) ("[P]unishment for a status is particularly obnoxious . . . because it involves punishment for a mere propensity."); *United States v. Robel*, 389 U.S. 258, 265-66 (1967) (membership in Communist Party was not sufficient basis to impute objectives of organization to member).

The present Policy is clearly aimed at status. *Holmes*, 920 F. Supp. at 1528 ("Any purported distinction between status and conduct under the policy is purely illusory."). A service member may be discharged from military service not for illegal conduct but simply because of an acknowledgment of sexual orientation. The disparity of treatment accorded homosexuals and heterosexuals in the military underscores the status-based nature of the Policy. Recent events involving a number of military bases around the country demonstrate that some heterosexuals may engage in conduct that violates the Uniform Code of Military Justice. Despite this fact, there is no general presumption in federal law or military regulations that

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of others—sadly echo the rationales employed by the armed forces to justify strict racial segregation during World War II. *See Watkins v. United States Army*, 875 F.2d 699, 729 (9th Cir. 1989) (Norris, J., concurring) ("As recently as World War II both the Army chief of staff and the Secretary of the Navy justified racial segregation in the ranks as necessary to maintain efficiency, discipline, and morale."), *cert. denied*, 498 U.S. 957 (1990).

heterosexuals will automatically or necessarily sexually assault or harass their peers. The presumption is that they will not engage in such conduct and discharge only occurs when there is evidence of prohibited conduct. Homosexual service members are granted no such latitude. The assumptions underlying this policy and its enforcement mechanism—equating speech with conduct —make plain that this government policy is aimed at punishing certain citizens based on who they are and not because of what they have done. Such a status-based policy is patently irrational and contrary to the equal protection decisions of this Court.

E. The policy as applied violates LTJG Selland's First Amendment right to free speech. Although First Amendment rights may be limited in the military setting, such restrictions are permissible only when they "protect a substantial Government interest unrelated to the suppression of free expression." *Brown v. Glines*, 444 U.S. 348, 354 (1980). Despite this limitation, "[i]t is axiomatic that the government may not regulate speech based on its subjective content or the message it conveys." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 115 S. Ct. 2510, 2516 (1995). Moreover, pure speech is entitled to the greatest protection. ("Discrimination against speech because of its message is presumed to be unconstitutional.") *Id.* at 2516.

Here, the government's discharge of LTJG Selland based solely on his statements constitutes nothing more than an overbroad, discriminatory restraint of speech prohibiting "the expression of an idea simply because [the military] finds [it] offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This regulation of speech represents a broad scale assault on the First Amendment, which cannot be countenanced by the Court, even in the more restrictive military environment.

Nor can the compelling First Amendment issues raised by this case be obviated because LTJG Selland's state-

ments purportedly are being used simply as "evidence" of prohibited conduct, and are not themselves the focus of the Policy. If the government's professed desire not to penalize a service member simply because of homosexual orientation is to have any meaning, LTJG Selland's disclosure cannot be grounds for discharge. As noted by one court, a mere statement of sexual orientation cannot have any evidentary value as it constitutes "nothing more than a verbalization of what the military has expressly stated is permissible." *Holmes*, 920 F. Supp. at 1535.

There is little question that the Policy targets speech based on its content. *Holmes*, 920 F. Supp. at 1535. ("[T]here is no legitimate dispute that the Act and Directives are content-based, as they target service members who acknowledge their homosexuality."). Other homosexuals are permitted to continue military service provided that they not give voice to their orientation. Moreover, the architects of the Policy have admitted that discharge of acknowledged homosexuals is not because of any misconduct on their part, but because of the adverse reaction of heterosexual colleagues who may find such statements offensive or disagreeable. The Policy—"Don't Tell"—is aptly named: a homosexual service member is forewarned that the price for speaking openly and honestly as to his or her sexual orientation is to be stripped of his or her rank and discharged from the service. Such a policy stands in violation of the First Amendment.

F. Lastly, the Policy's "rebuttable presumption" is a illusory standard that cannot be satisfied and violates the due process clause and the APA. Under the Policy, a statement by a service member that he or she is a homosexual creates a "rebuttable presumption that the service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." App., 123a. The service member will then be discharged unless he or she can prove by a preponderance of the evidence that "he or she does not engage in, have a propensity to engage in or intend to engage in homo-

sexual acts." *Id.* This device imposes an impossible burden of proof.

In structuring the Policy, Congress sought to severely limit the evidence that a service member could offer to rebut the presumption of homosexual conduct. Specifically, the Senate Report outlining the Policy states: "a member cannot rebut the presumption simply through a promise to adhere to military standards of conduct in the future; nor can the member rebut the presumption by a statement to the effect that he or she has a propensity towards homosexuality but has not acted on it." C.A. App., 442. Given these restrictions, a number of courts have deemed the presumption essentially irrebuttable. *Holmes*, 920 F. Supp. 1528. ("The policy does not provide a concrete method much less a realistic opportunity for a service member to prove that he or she does not engage in, have a propensity to engage in, or intend to engage in homosexual conduct."); *Able v. United States*, 880 F. Supp. 968, 976 (E.D.N.Y. 1995) (once a service member admits to a homosexual orientation, the policy treats the admission as "proof of this case"), *modified* 88 F.3d 1280 (2d Cir. 1996).

The case below starkly illustrates this point. Absent an absolute recantation of his prior statement, there was no evidence that LTJG Selland could present that would prevent his discharge under the Policy. Such a procedure, which lies at the heart of the administrative decision below, does not comport with the requirements of the Due Process Clause or the APA.

CONCLUSION

For all of the above reasons, Petitioner respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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February 5, 1997

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 95-2982

RICHARD DIRK SELLAND, LTJG,
Plaintiff-Appellant,

versus

WILLIAM J. PERRY, The Honorable Secretary of Defense;
JOHN H. DALTON, Secretary of the Navy,
Defendants-Appellees.

FAMILY RESEARCH COUNCIL,
Amicus Curiae.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
Joseph H. Young, Senior District Judge
(CA-95-1145-Y)

Submitted: October 18, 1996

Decided: November 7, 1996

Before HALL and LUTTIG, Circuit Judges, and BULLOCK, Chief United States District Judge for the Middle District of North Carolina, sitting by designation.

PER CURIAM:

Lieutenant Richard Dirk Selland appeals an order of the district court upholding his involuntary discharge from the United States Navy on account of his acknowledged homosexuality. He argues that the statute [1] and policy [2] under which he was discharged are unconstitutional. We have recently held that they are not. *Thomasson v. Perry*, 80 F.3d 915 (4th Cir.) (en banc), *cert. denied*, 65 U.S.L.W. 3033 (U.S. Oct. 21, 1996). The judgment of the district court is therefore affirmed. We dispense with oral argument because the dispositive issue has recently been decided authoritatively.[3]

AFFIRMED

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[1] Section 571 of the National Defense Authorization Act for Fiscal Year 1994, codified at 10 U.S.C. § 654.

[2] Department of Defense Directive 1332.20 (March 4, 1994).

[3] The temporary injunction issued by the district court, which prohibited Selland's discharge pending appeal, is dissolved forthwith.

APPENDIX B

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. Y-95-1145

LTJG RICHARD DIRK SELLAND

v.

THE HONORABLE WILLIAM PERRY, *et al.*

Oct. 31, 1995

MEMORANDUM OPINION

JOSEPH H. YOUNG, Senior District Judge.

In response to Lieutenant Richard Dirk Selland's challenge to the Navy's decision to separate him from service under the "Don't Ask Don't Tell" policy (hereinafter "Policy"), the Defendants seek summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56. Since the parties only disagree on the legal consequences of the underlying facts, this case is appropirate for summary judgment.

I. BACKGROUND

The Policy in question is part of the Defense Authorization Act of 1994, which was enacted on November 30, 1993. In formulating the Policy Congress considered extensive testimony from interested parties within and without the military as well as the importance of maintaining an effective military defense capability. *See Policy Concerning Homosexuality in the Armed Forces: Hearing Before the Senate Comm. on Armed Services*, 103d Cong., 2d Sess. (1993); *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong., 1st Sess. (1993); *Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services*, 103d Cong., 1st Sess. (1993). Evidently, Congress gave great weight to the opinion of military professionals that unit cohesion is crucial to combat capability and that homosexual conduct creates an unacceptable risk to morale, good order and discipline in the fundamentally unique military society, for the legislative findings make specific reference to these factors. *See* 10 U.S.C. § 654(a) (1994).

The Policy requires the military to separate members from service if, after following procedures set forth in Department of Defense regulations, it is found that the member has (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts," (2) "stated that he or she is a homosexual or bisexual" or (3) "has married or attempted to marry a person known to be of the same biological sex." 10 U.S.C. § 654(b). Separation is not required if a member states he is homosexual if the member demonstrates that he is "not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654(b)(2).

The regulations implementing the Policy provide that officers may be separated on the grounds contained in the statute. Separation of Regular Commissioned Officers, DoD Directive 1332.30. In addition, the Directive outlines a procedure whereby a statement of homosexual identity "creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts" and the officer is allowed to present evidence to the contrary. *Id.* at ¶ C.1.b.

Lieutenant Selland was assigned to serve as the Supply Officer on the USS Hammerhead, a fast-attack nuclear submarine, upon his graduation from Supply School. Jokes from the crew members about his homosexuality led Selland to seek the counsel of a Navy chaplain, who urged him to discuss the matter with Commander Karl M. Hasslinger. On January 21, 1993, Selland told Hasslinger that he was homosexual and involved in a monogamous relationship. Transcript of the Board of Inquiry Investigation at 39-40, 42, 125. After informing his superior about the situation, Hasslinger told Selland to leave the ship. The following day Selland was assigned to shore duty and was notified that the Navy would initiate separation proceedings against him. Selland obtained a preliminary injunction enjoining the Navy from proceeding with his separation. *See Selland v. Aspin*, 832 F.Supp. 12, 16 (D.D.C.1993). The suit was later dismissed by stipulation after the current Policy became effective.

The Navy renewed separation proceedings against Selland pursuant to the current Policy. On July 12, 1994 a Board of Inquiry convened in Norfolk, Virginia to determine whether Selland had violated the Policy. During the voir dire examination of the Board panel the following exchange occurred between Captain Dale J. Feltes, a member of the Board, and Selland's Navy counsel:

Counsel: Do you believe that an acknowledged homosexual can be an effective Navy officer?

* * * * * *

Feltes: No, I don't.

Counsel: Would you personally have any trouble serving with someone who was gay?

* * * * * *

Feltes: Yes. I would.

Transcript of Board of Inquiry Investigation at 16. The presiding Legal Advisor denied a challenge to Feltes' fitness to serve on the panel based on these statements. During the proceeding, Selland introduced evidence demonstrating his contributions to the United States Navy but did not attempt to rebut the presumption of homosexual conduct or disclaim an intention to engage in future homosexual acts as required by the Policy. Transcript of the Board of Inquiry Investigation at 125. The three-member Board of Inquiry unanimously recommended that Selland be separated from the service. The Board of Review rejected Selland's appeal, and on March 13, 1995 the Secretary of the Navy approved the discharge of Selland.

Selland filed this suit challenging the constitutionality of the Policy as applied to him, and on April 26, 1995 this Court granted a preliminary injunction preventing the Navy from discharging Selland for at least six months.

II. FIRST AMENDMENT

Homosexual acts can be prohibited by the military. *See Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986). Selland claims that the Policy violates his First Amendment right to free speech because the separation was based on his statement that he is homosexual. The First Amendment provides in relevant part that "Congress shall pass no law . . . abridging the freedom of speech. . . ." U.S. Const. amend. I.

To find a violation of the Free Speech clause, it is first necessary to determine that the Policy restrains speech in some manner. Unquestionably Selland's admission of homosexuality, made to his chaplain and commanding officer on board the submarine, initiated the separation proceedings against him, because this statement gave rise to a presumption that he engages in homosexual acts. The government argues that the Policy does not implicate the First Amendment because the admission of homosexuality is only used as evidence of homosexual conduct and claims this is analogous to the facts of *Wisconsin v. Mitchell*, —— U.S. ——, 113 S.Ct. 2194, 124 L.Ed.2d 436 (1993), in which the Supreme Court held that Wisconsin could enhance a criminal sentence after inferring a racial motivation for assault from remarks made by the defendant, and that the "First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or the motive or intent. . . ." *Id.* at ——, 113 S.Ct. at 2201.

There is much force to the government's argument. Just as a jury might infer a criminal violation from statements of the accused, the Navy infers prohibited homosexual acts from admissions of homosexuality. This inference follows the common sense notion that those who identify themselves as homosexual have engaged and will engage in homosexual acts. Selland's statements that he was homosexual and in a relationship were used in an administrative hearing to determine whether he had committed, or had the propensity to commit, homosexual acts, and he was given the opportunity to offer evidence to the contrary.

But the Policy will probably inhibit members from expressing their homosexuality. *Cf. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, —— U.S. ——, ——, 115 S.Ct. 2338, 2346, 132 L.Ed.2d 487 (1995) (finding that participation of group in St. Patrick's Day parade was expressive because of their self-identification as homosexual). Even though any inhibition would only be a secondary effect of the valid pro-

hibition on homosexual acts, the sanctity of the First Amendment among the constellation of constitutional rights means that even incidental infringements on speech are closely examined.

The right to free speech must be analyzed in light of the "plenary control" over the Armed Forces granted to the Congress and the President in Article I, Section 8 and Article II, Section 2 of the Constitution. The Constitutional responsibility of the legislative and executive branches requires that when evaluating whether a particular restriction is justified, "courts must give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger,* 475 U.S. 503, 507, 106 S.Ct. 1310, 1313, 89 L.Ed.2d 478 (1986). Deference is warranted when the policy in question concerns the "complex, subtle, and professional decisions as to the composition, training, equipping and control of a military force," *Gilligan v. Morgan,* 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973), and is a "studied choice of one alternative in preference to another for furthering that goal." *Rostker v. Goldberg,* 453 U.S. 57, 72, 101 S.Ct. 2646, 2655, 69 L.Ed.2d 478 (1981). When considering particular actions, deference gives a military commander appropriate discretion "to avert what he perceives to be a clear danger to the loyalty, discipline, or morality of troops . . . under his command." *Greer v. Spock,* 424 U.S. 828, 840, 96 S.Ct. 1211, 1218, 47 L.Ed.2d 505 (1976).

Thus, when balancing First Amendment rights against military policy, the Supreme Court has taken the position that the "fundamental necessity for obedience, and the consequent necessity for imposition of discipline, may render permissible within the military that which would be constitutionally impermissible outside it." *Parker v. Levy,* 417 U.S. 733, 758, 94 S.Ct. 2547, 2563, 41 L.Ed. 2d 439 (1974). The relaxed restrictions of the First

Amendment in this context permit the military to discipline a doctor who urged disobedience, *Parker v. Levy*, 417 U.S. 733, 94 S.Ct. 2547, 41 L.Ed.2d 439 (1974), to ban campaign literature and political speeches on a partly open military base, *Greer v. Spock*, 424 U.S. 828, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976), to require prior restraint on the right to circulate petitions on bases, *Brown v. Glines*, 444 U.S. 348, 100 S.Ct. 594, 62 L.Ed. 2d 540 (1980), and to prevent certain persons from entering a military base during an "open house," *United States v. Albertini*, 472 U.S. 675, 105 S.Ct. 2897, 86 L.Ed.2d 536 (1985). Similarly, it was held that a General could prohibit door-to-door distribution of advertising circulars in residential areas of a military base. *Shopco Distribution Co., Inc. v. Commanding General*, 885 F.2d 167 (4th Cir.1989).

The general principle of deference is applicable to review of the Navy's decision to separate Selland. There is no question relating to the constitutionality of the stated objective of the Policy to enforce a prohibition on homosexual acts. *See Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986); *Dronenburg v. Zech*, 741 F.2d 1388 (D.C.Cir.1984). Congress enacted the Policy when, after long deliberation, it determined that homosexual acts are disruptive to the military's mission and the military must be allowed to take prompt precautionary measures to prevent such disruption. In light of the Constitutional prerogative over the Armed Forces given to Congress and the President, this Court is convinced it should not revisit the findings that underlie the "Don't Ask Don't Tell" policy and must defer to the military's decision that its unique mission of maintaining readiness for armed conflict requires initiation of separation proceedings at the earliest possible moment. It would be improper for this Court to rule that the Navy should have retained Selland on the crew until he committed a homosexual act after Selland stated that he was homosexual in the close confines of an attack submarine.

The Policy is designed to prevent homosexual acts and any incidental burden on speech resulting from its application does not violate the First Amendment.

III. STATUS

Although the Policy does not regulate speech *qua* speech, Selland argues that it imposes a sanction on his status as a homosexual and is thus unconstitutional under the holding of *Robinson v. California,* 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

The Policy, insofar as it allows separation solely on the basis of "propensity" to commit homosexual acts, could be interpreted as imposing a sanction on homosexual status. Indeed, it is unclear what factors will rebut the presumption of "propensity" to commit homosexual acts so that a member's mere homosexual "orientation" will not require his separation from service.

In *Robinson* the Supreme Court held that a California statute that made the "chronic condition" or "status" of narcotics addiction a criminal offense inflicted a cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. In so ruling the Court emphasized that that statute was not one which punished "antisocial or disorderly behavior" resulting from the use of narcotics. *Id.* at 666, 82 S.Ct. at 1420. *Robinson* is distinguishable from this case on several grounds. Separation from service is not a criminal penalty and therefore does not implicate the Eighth Amendment. *See Ingraham v. Wright,* 525 F.2d 909 (5th Cir.1976), *aff'd* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 711; *Zwick v. Freeman,* 373 F.2d 110 (2d Cir.1967), *cert. denied,* 389 U.S. 835, 88 S.Ct. 43, 19 L.Ed.2d 96. Moreover, the Navy considered evidence that Selland stated that he was in a relationship and did not need to rely solely on his statement that he was homosexual to reach its conclusion that he had a "propensity" to commit homosexual acts.

See Transcript of the Board of Inquiry Investigation at 39-40, 42, 125.

The initiation of separation proceedings was not an unconstitutional sanction on Selland's status.

IV. EQUAL PROTECTION

Selland next claims that his separation from the Navy denied him the equal protection of the laws. The Equal Protection Clause of the Fourteenth Amendment directs that no state shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV. It is made binding on the federal government by the Due Process Clause of the Fifth Amendment. *Bolling v. Sharpe*, 347 U.S. 497, 498-99, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954). Fifth Amendment equal protection claims are treated precisely the same as equal protection claims under the Fourteenth Amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n. 2, 95 S.Ct. 1225, 1228 n. 2, 43 L.Ed.2d 514 (1975).

In any equal protection inquiry the level of review adopted is critical. Selland urges this Court to adopt "strict scrutiny," which applies when a law infringes a "fundamental right" or creates a "suspect classification." *See Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440, 105 S.Ct. 3249, 3254, 87 L.Ed.2d 313 (1985). However, there is no infringement of a "fundamental right" in this case, *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), and homosexuality is not recognized as a suspect classification, *Cleburne*, 473 U.S. at 441-442, 105 S.Ct. at 3255. *Cf. Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981). Therefore the Policy will be examined under "rational basis" review.

The Supreme Court recently discussed the operation of rational basis review in equal protection analysis in *Heller v. Doe*, —— U.S. ——, 113 S.Ct. 2637, 125

L.Ed.2d 257 (1993). At this level of review classifications are "accorded a strong presumption of validity" and do not violate the Equal Protection clause "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Id.* at ——, 113 S.Ct. at 2642. The government is relieved from the obligation of producing evidence of rationality and the party attacking the law must bear the burden of negating all possible justifications whether or not found in the record. *Id.* at ——, 113 S.Ct. at 2643. Finally, "courts are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Id.*

Selland contends that the ban on homosexual conduct is not rationally related to the admittedly legitimate purpose of maintaining discipline and fighting ability in the military. He claims that the justifications offered by the government—that the ban promotes unit cohesion, maintains discipline and morale, and prevents sexual tension and unit polarization—are all derived from hatred and prejudice held by heterosexuals towards homosexuals. Selland supports this argument by citing two cases that struck down laws that the Supreme Court determined were based on fear and prejudice. *See Cleburne, supra* (invalidating zoning ordinance requiring special use permits for a group home for the mentally retarded); *Palmore v. Sidoti*, 466 U.S. 429, 104 S.Ct. 1879, 80 L.Ed.2d 421 (1984) (invalidating laws removing a child from the mother's custody because of her interracial marriage).

In making this argument Selland is asking this Court to find that the ban on homosexual acts is based solely on hatred and prejudice. It is true that other courts that have faced this issue have been willing to make this inference. *See, e.g., Pruitt v. Cheney*, 963 F.2d 1160 (9th Cir.1991) (a similar policy violated Equal Protection Clause because it was based on social disapproval and government did not establish a rational basis in the rec-

ord); *Cammermeyer v. Aspin*, 850 F.Supp. 910 (W.D. Wa.1994) (a similar policy violated Equal Protection Clause because it was based on the prejudice of soldiers, not the unfitness of gays to serve). However, this Court is not satisfied that Selland has met his burden of proof in attacking the rationality of a law. As the *Heller* court made clear, Selland must negate all possible justifications whether or not they are contained in the record.

Deference towards Congressional and Presidential judgment in the military context, previously discussed in part II of this opinion, counsels that courts should proceed with caution even in an equal protection claim. This approach was followed by the Supreme Court when it upheld Congress' decision to require only men and not women to register for the peacetime draft against an equal protection challenge. *Rostker v. Goldberg*, 453 U.S. 57, 101 S.Ct. 2646, 69 L.Ed.2d 478 (1981) (applying intermediate scrutiny). The military must continually prepare for combat at any time and lapses in discipline and order can jeopardize the security of the nation and the safety of members of the armed forces. These parameters must be considered when making rational decisions about what is necessary to maintain the effectiveness of fighting units.

Since Selland challenges the Policy as applied to him, the equal protection analysis is limited to the facts of this case. Selland's admission occurred in the confines of a nuclear attack submarine, where the crew has little or no privacy and is isolated from the outside world for prolonged periods of time. Indeed, at the time of his admission the ship was preparing for an unsupported top secret mission. Transcript of the Board of Inquiry Investigation at 48. In such a context, this Court cannot determine that the decision to separate Selland because of possible disruption among the crew was irrational. The rationality of separating a member from service would be more dubious if the statement occurred on a base on the main-

land or in units not facing imminent combat situations, but that is not the factual situation before this Court.

Accordingly, the application of the Policy to Selland did not violate the Equal Protection clause.

V. OTHER CLAIMS

Selland raises several other challenges to the Policy. First, he claims that the Board of Inquiry did not afford him Due Process of law as required by the Fifth Amendment of the Constitution because of the statements of Captain Feltes in the voir dire examination. The Due Process Clause has been interpreted to guarantee the "right to a fair trial in a fair tribunal." *Withrow v. Larkin*, 421 U.S. 35, 46-47, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975). Although Feltes expressed doubt about whether Selland could be an effective Naval officer, the issue to be decided by the Board was whether Selland had violated the Policy. Given the limited mission of the Board of Inquiry, the evidence before the Board that Selland had stated he was homosexual and in a monogamous relationship, and the failure of Selland to enter evidence showing that he did not have a propensity to commit homosexual acts as required by the Policy, it cannot be said that Feltes' remarks so tainted the tribunal as to result in a Constitutional violation. The record does not show that the Policy was misapplied in this case. Selland's due process argument is another attempt to attack the legal presumption, which this Court has determined is valid.

Selland also claims that the decision to separate him was arbitrary and capricious in violation of the Administrative Procedure Act. *See* 5 U.S.C. § 706. An agency acts in an arbitrary and capricious manner if it relies on factors that Congress did not intend it to consider or explains its decision in a manner contrary to evidence before it. *Bedford County Memorial Hospital v. Health and*

Human Services, 769 F.2d 1017 (4th Cir.1985). In this case the Navy's decision was based on the application of standards detailed in both the statute and the DoD Directive, a two-day hearing before a Board of inquiry, and consideration of an administrative record that comprises over one thousand pages. It is apparent that the Board deliberated carefully and considered the factors outlined in the Policy. Again, this argument is a futile attempt to contest the Policy itself.

VI. CONCLUSION

For the foregoing reasons no triable issues of fact remain and the Defendants' Motion for Summary Judgment is granted.

ORDER

In accordance with the attached Memorandum, it is this 31st day of October, 1995, by the United States District Court for the District of Maryland, ORDERED:

1. That Defendants' Motion for Summary Judgment BE, and hereby IS, GRANTED; and

2. That judgment BE, and hereby IS, ENTERED in favor of the Defendants.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 95-2185

PAUL G. THOMASSON,
Lieutenant, United States Navy,
Plaintiff-Appellant,

v.

WILLIAM J. PERRY, Secretary of Defense;
JOHN H. DALTON, Secretary of the Navy,
Defendants-Appellees,

UNION OF AMERICAN HEBREW CONGREGATIONS; THE AMERICAN JEWISH CONGRESS; NATIONAL ORGANIZATION FOR WOMEN; NOW LEGAL DEFENSE AND EDUCATION FUND; CENTER FOR WOMEN POLICY STUDIES; NATIONAL LESBIAN AND GAY LAW ASSOCIATION; GAY AND LESBIAN ADVOCATES AND DEFENDERS; AMERICAN CIVIL LIBERTIES UNION; LAMBDA LEGAL DEFENSE AND EDUCATION FUND; SERVICEMEMBERS LEGAL DEFENSE NETWORK; IAOMAI, INCORPORATED; FAMILY RESEARCH COUNCIL; IOTA LEGAL DEFENSE FUND,
Amici Curiae.

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Claude M. Hilton, District Judge.
(CA-95-252-A)

Argued: December 5, 1995
Decided: April 5, 1996
[As Amended: April 17, 1996]

Before WILKINSON, Chief Judge, and RUSSELL, WIDENER, HALL, MURNAGHAN, ERVIN, WILKINS, NIEMEYER, HAMILTON, LUTTIG, WILLIAMS, MICHAEL, and MOTZ, Circuit Judges, sitting en banc.

OPINION

WILKINSON, Chief Judge:

Former Navy Lieutenant Paul G. Thomasson challenges the constitutional validity of Section 571 of the National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654, and the Department of Defense Directive that governs homosexuality in the military, pursuant to which Thomasson received an honorable discharge from the Navy. We hold that the challenged statute is constitutional and that the discharge represented an appropriate exercise of military authority under the Act. In so holding, we affirm the judgment of the district court.

I.

A.

We shall set forth at the outset the relevant statutory framework in this case. In November, 1993, after lengthy deliberations, Congress approved and the President signed the National Defense Authorization Act, which codified a policy with respect to homosexuality and the armed forces. That policy came to be colloquially known as "Don't Ask, Don't Tell." In a series of find-

ings that established the predicate for the policy, Congress declared that "[m]ilitary life is fundamentally different from civilian life," 10 U.S.C. § 654(a)(8), and that "[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion," 10 U.S.C. § 654(a)(6). Thus acknowledging that the demands of military life are distinctive, Congress further determined that "[t]he prohibition against homosexual conduct is a long-standing element of military law that continues to be necessary in the unique circumstances of military service." 10 U.S.C. § 654(a)(13). It also found that service members who demonstrate a "propensity or intent to engage in homosexual acts [] create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15).

In order to avoid this risk, the Act provides that members shall be separated from the armed services if one of three findings is made: the service member engaged or attempted to engage in homosexual acts, 10 U.S.C. § 654(b)(1); the service member married or attempted to marry a person of the same sex, 10 U.S.C. § 654(b)(3); or the service member "stated that he or she is a homosexual . . . unless there is a further finding . . . that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." 10 U.S.C. § 654(b)(2). It is pursuant to this last provision—the "statements" provision—that Thomasson was honorably discharged from the Navy.

In December, 1993, the Department of Defense announced Directives implementing the Act. Like the statute, the applicable Directive provides for separation if an officer "has engaged in . . . homosexual act[s]," "has married or attempted to marry" another of the same sex, or "has made a statement that he or she is a homosexual"

and fails to demonstrate that "he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30, Encl. 2, ¶ C, at 2-1, 2-2. The Directive also provides that the officer's statement "creates a rebuttable presumption that the officer engages in homosexual acts or has a propensity or intent to do so." DoD Dir. 1332.30, Encl. 2, ¶ C.1.b., at 2-2. The officer is informed of this presumption and afforded an opportunity to rebut it by presenting appropriate evidence. *Id.* Whether the presumption has been rebutted is determined by a variety of factors: whether the officer has engaged in homosexual acts; the officer's credibility; testimony from others about the officer's past conduct; the nature and circumstances of the officer's statement; and any other evidence relevant to whether the officer has a propensity or intent to engage in homosexual acts. *Id.*

B.

Paul G. Thomasson, the plaintiff in this case, rose to the rank of Lieutenant in his ten year Naval career. Thomasson's service record, has been a commendable one. *Thomasson v. Perry,* 895 F. Supp. 820, 823, 829 (E.D. Va. 1995). Thomasson consistently received the highest possible performance ratings, he was one of a few junior officers selected for a Joint Chiefs of Staff Internship, and his supervisors, including senior Naval officers, praised his work. Rear Admiral Lee F. Gunn, for example, stated in an evaluation that Thomasson was "a true 'front runner' who should be groomed for the most senior leadership in tomorrow's Navy."

In early March, 1994, soon after reading the Navy message implementing the DoD Directives, Thomasson wrote and presented a letter to four Admirals for whom he served. Noting in the letter that "the time has come when I can remain silent no longer," Thomasson stated "I am gay" and expressed strong disagreement with the

military's policy. In accordance with that policy, the Navy initiated separation proceedings against him. In May, 1994, a three-member Board of Inquiry convened and conducted a two day hearing. At the hearing, the Navy conceded that Thomasson had an "enviable" service record. But in seeking his separation, it relied both upon Thomasson's declaration that he was gay and the testimony of one of the Admirals who received the letter. The Navy advised the Board of the congressional findings that supported the Act and the meaning of the military's Directive. Under the Act and Directive, it argued, Thomasson's letter gave rise to a presumption that he had a propensity or intent to engage in homosexual acts which, if unrebutted, warranted separation.

For his part, Thomasson presented a copy of his service record, live and written testimony from co-workers who expressed admiration for his capabilities and professionalism, a statement recounting his career and his decision to write the letter announcing that he was gay, and expert testimony on both homosexuality and the meaning of the military's policy. But Thomasson did not, as the district court observed, tender evidence to rebut the presumption that arose from his declaration of homosexuality; that is, he presented no specific evidence on whether he engaged in or had a propensity or intent to engage in homosexual acts. 895 F. Supp. at 823. In fact, Thomasson's statement averred that he would "not go further in degrading myself by disproving a charge about sexual conduct that no one has made." *Id.* The Navy argued that this defense fell short of rebutting the presumption that arose from Thomasson's declaration of his homosexuality, and therefore that he should be honorably discharged.

The Board unanimously found that Thomasson's announcement of his homosexuality gave rise to a presumption of a propensity or intent to engage in homosexual acts and that this presumption had not been rebutted.

Because he thus violated Navy policy, Thomasson "failed to demonstrate acceptable qualities of leadership required of an officer in his grade" and the Board recommended that Thomasson be honorably discharged. A three-member Board of Review unanimously upheld this finding, and the Chief of Navy Personnel signed Thomasson's discharge orders. *Id.* He was scheduled to be separated in February, 1995.

Thomasson brought this action in February, 1995, seeking declaratory and injunctive relief to prevent his discharge. The district court preliminarily enjoined Thomasson's discharge pending resolution of his claims. Ultimately, however, the court granted summary judgment for the government. It held tha the Act and Directive did not violate equal protection of the laws, the First Amendment, the Due Process Clause or the Administrative Procedure Act. *Id.* at 831. Thomasson appealed that decision and his subsequent discharge from the Navy. A panel of this court heard argument in September, 1995, and the full court subsequently voted to hear the case *en banc*.

II.

A court cannot review a case without considering the context in which it arises. We shall explore that context in some detail. We do so out of a belief that this decision implicates in the most fundamental way the role of courts in our democratic system. Separation of powers principles form an integral part of the process of judicial review. To overlook these principles would be as much of an omission as a failure to address the substance of Thomasson's particular constitutional claims. What Thomasson seeks to upset here is a carefully crafted national political compromise, one that was the product of sustained and delicate negotiations involving both the Executive and Legislative branches of our government. While still a candidate, President Clinton expressed an intention to revisit the military's policy on homosexual

service members. After he was sworn into office, the President on January 29, 1993, directed the Secretary of Defense to submit to him a draft Executive Order by July, 1993, "ending discrimination on the basis of sexual orientation in determining who may serve in the Armed Forces." Memorandum on Ending Discrimination in the Armed Forces, 1 Pub. Papers 23 (Jan. 29, 1993). The President instructed the Secretary to consult with the Joint Chiefs of Staff, Congress, and concerned individuals in developing the Order; the Order was to be accompanied by a study, which would recommend how the policy revision could be carried out in a way that was "practical, realistic, and consistent with the high standards of combat effectiveness and unit cohesion our Armed Forces must maintain." *Id.* While this review was underway, an interim policy was put in place which, in part, dictated that new recruits would no longer be questioned about their sexual orientation.

The issue quickly generated interest in Congress. In early February of 1993, an amendment was offered in the Senate to the Family and Medical Leave Act to overturn the interim policy by freezing in place the military's pre-existing approach with respect to homosexual service members. 139 Cong. Rec. S1263 (daily ed. Feb. 4, 1993). This effort failed, however, 139 Cong. Rec. S1338-9 (daily ed. Feb. 4, 1993), and the Senate instead adopted a provision calling for a review of the military's policy by the Secretary of Defense and the Senate Armed Services Committee, a review that was to be completed by July, 1993, 139 Cong. Rec. S1263, S1338 (daily ed. Feb. 4, 1993). After House approval, this amendment was enacted into law. Pub. L. 103-3 § 601, 107 Stat. 6, 28-9 (1993).

In the first seven months of 1993, both the Executive Branch and Congressional committees engaged in an extensive review of the military's policy. The Senate Armed Services Committee held no less than nine days of hear-

ings, including a field hearing at the Norfolk Naval Complex, taking testimony from nearly fifty witnesses. The House Armed Services Committee held five days of hearings. Witnesses who appeared at these hearings represented a broad range of views and backgrounds. They included: the Secretary of Defense and the Chairman of the Joint Chiefs of Staff; military and legal experts; enlisted personnel, officers and senior military leaders; and activists supporting and opposing the military's policy. *See Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services*, 103d Cong., 1st Sess. (1993) (*Assessment of the Plan: House Hearings*); *Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services*, 103d Cong., 1st Sess. (1993) (*Senate Hearings*); *Policy Implications of Lifting the Ban on Homosexuals in the Military: Hearings Before the House Comm. on Armed Services*, 103d Cong., 1st Sess. (1993) (*Policy Implications: House Hearings*).

At the same time, the Department of Defense conducted its own exhaustive review. It convened a military working group composed of senior members of each service, commissioned a study by the Rand Corporation, initiated regular consultations with the Joint Chiefs of Staff and leaders of each service, studied the history of the military's response to social change, and consulted legal experts. General Colin N. Powell described the consideration by the Joint Chiefs of Staff in this way: "We have challenged our assumptions. We have argued with each other. We have consulted with commanders at all levels." *Assessment of the Plan: House Hearings*, at 31.

On July 19, 1993, President Clinton announced a new policy on homosexuals in the military developed as a result of the Defense Department's review. The President and Secretary of Defense explained that under the new

policy applicants for military service would not be asked or required to reveal their sexual orientation, but once in the service they would be separated for homosexual conduct. 1 Pub. Papers 1111 (July 19, 1993); *Senate Hearings*, at 705 (Statement of Secretary of Defense, Les Aspin). The Armed Services Committees of the House and Senate then reviewed the policy in detail.

In late July, 1993, drawing on the combined wisdom of this exhaustive examination in the Executive and Legislative branches, the House and Senate Armed Services Committees proposed to codify the military's policy on homosexual service members. The Senate stated that its proposal was developed only after the committee considered "a wide range of experiences, including those of current and former servicemembers who have publicly identified themselves as gay or lesbian. The committee received a broad variety of views . . . . The committee carefully considered all points of view in developing its recommendations." S. Rep. No. 112, 103d Cong., 1st Sess. 270 (1993). Likewise, the House committee reported that its recommendation was based on "an extensive hearing record, as well as a full consideration of the extended public debate on this issue." H. R. Rep. No. 200, 103d Cong., 1st Sess. 287 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2013, 2074.

Before the policy was finally enacted, the full House and Senate undertook a thorough debate of it, and both houses considered amendments on the floor. Each house discussed and rejected companion amendments that, in place of the proposed codification, would have permitted the President and military leaders to develop whatever policy they deemed appropriate. 139 Cong. Rec. S11168-11228 (daily ed. Sept. 9, 1993); 139 Cong. Rec. H7080-84 (daily ed. Sept. 28, 1993). The House also debated and rejected a proposal to require the Defense Department to resume its questioning of new recruits about their

sexual orientation. 139 Cong. Rec. H7084-86 (daily ed. Sept. 28, 1993).

Both houses ultimately approved the committee proposals. In the words of the Chairman of the Senate Armed Services Committee, the provision was "as fair as we can be to the individuals involved, while, at the same time, maintaining the kind of unit cohesion and military effectiveness that we expect our military services to be able to carry out and perform for the country." 139 Cong. Rec. S11205 (daily ed. Sept. 9, 1993); *see also* 139 Cong. Rec. H7086-89 (daily ed. Sept. 28, 1993). Finally, the Act was signed by the President on November 30, 1993.

What Thomasson challenges, therefore, is a statute that embodies the exhaustive efforts of the democratically accountable branches of American government and an enactment that reflects month upon month of political negotiations and deliberation. Such products of the democratic process are seldom completely tidy or universally satisfactory, but it is precisely on that account that they deserve judicial respect. An Act of Congress reflects a range of views that a judicial decision cannot replicate. Indeed, Justice Holmes admonished that judging the constitutionality of an Act of Congress is "the gravest and most delicate duty" that a court performs. *Blodgett v. Holden*, 275 U.S. 142, 148 (1927). And "[g]iven the deference due 'the duly enacted and carefully considered decision of a coequal and representative branch of our Government', [this court cannot] lightly second-guess such legislative judgments . . . ." *Westside Community Bd. of Ed. v. Mergens*, 496 U.S. 226, 251 (1990) (O'Connor, J.) (quoting *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 319 (1985)) (other citation omitted).

Thomasson requests that we simply set aside these lengthy labors of the legislative process and supplant with our own judicial judgment the product of a serious and prolonged

debate on a subject of paramount national importance. This would, however, be a step of substantial gravity. The courts were not created to award by judicial decree what was not achievable by political consensus. Our power to resolve particular controversies carries with it an obligation to respect general solutions. To overturn those solutions in the absence of a clear constitutional mandate would transform the judiciary into an instrument of disenfranchisement for all who use the political process to register the democratic will.

The Supreme Court could have been speaking about this very Act when it observed that the question "received considerable national attention and was the subject of wide-ranging public debate [and] was extensively considered by Congress in hearings, floor debate, and in committee." *Rostker v. Goldberg*, 453 U.S. 57, 72 (1981) (sustaining constitutionality of all-male draft registration). Congress has enacted and the President has signed legislation providing that a propensity or intent to engage in homosexual acts is incompatible with the distinctive requirements of military service. This considered judgment on the part of the coordinate branches of our government is one that the third branch has a solemn duty to respect.

III.

A.

Thomasson's challenge cannot be viewed apart from the special legal status of military life. The Constitution assigns the conduct of military affairs to the Legislative and Executive branches. There is nothing timid or half-hearted about this constitutional allocation of authority. Rather, the Constitution states fully and directly that the governance of military affairs is a shared responsibility of Congress and the President:

> The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . .

> To declare War, grant Letters of Marque and Reprisal, and make Rules concerning Captures on Land and Water;
>
> To raise and support Armies, but no Appropriation of Money to that Use shall be for a longer Term than two Years;
>
> To provide and maintain a Navy;
>
> To make Rules for the Government and Regulation of the land and naval Forces;
>
> To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions;
>
> To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress;

U.S. CONST. art I, § 8.

> The President shall be Commander in Chief of the Army and Navy of the United States, and of the Militia of the several States, when called into the actual Service of the United States;

U.S. CONST. art II, § 2.

This constitutional framework was adopted by the Founders in order that our newly christened nation might best defend itself. *See Federalist No. 23* (Alexander Hamilton) (Mentor, 1961). As Hamilton explained:

> The authorities essential to the common defense . . . ought to exist without limitation *because it is impossible to foresee or to define the extent and variety of national exigencies, and the correspondent extent*

> *and variety of the means which may be necessary to satisfy them.* The circumstances that endanger the safety of nations are infinite, and for this reason no constitutional shackles can wisely be imposed on the power to which the care of it is committed.

Id. at 153 (emphasis in original). Hamilton believed that this authority should include "any matter essential to the *formation, direction, or support* of the NATIONAL FORCES." *Id.* at 154 (emphasis in original).

Thus, it is no surprise that the Founders failed to provide the federal judiciary with a check over the military powers of Congress and the President. *See* U.S. CONST. art III. To do so would have placed, in Hamilton's words, a "constitutional shackle" on the ability of Congress and the President to carry out the duties attendant to national security. Moreover, the virtue of placing military power in the democratic branches was obvious: "[I]f the majority should be really disposed to exceed the proper limits, the community will be warned of the danger [by the minority], and [the community] will have an opportunity of taking measures to guard against it." *Federalist No. 26*, at 172 (Alexander Hamilton). The federal judiciary—appointed with life tenure—was not regarded as an appropriate repository for such immense power and accordingly was given "no influence over either the sword or the purse." *Federalist No. 78*, at 465 (Alexander Hamilton).

Thus, our Constitution does not authorize the courts to lay and collect taxes to provide for the common defense. The Constitution does not allow the courts to declare war or to raise armies. The judiciary has no authority to make rules for the regulation of military forces. Nor does the Constitution declare the Supreme Court to be the Commander in Chief. By comparison to its predecessors, Article III is a sparse provision, granting no enumerated powers of any kind, but merely jurisdiction "with such Exceptions, and under such Regulations as the Congress shall make." U.S. CONST. art III, § 2.

B.

Because "the Constitution contemplates that Congress has 'plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline,' " *Weiss v. United States*, 114 S. Ct. 752, 760 (1994) (quoting *Chappell v. Wallace*, 462 U.S. 296, 301 (1983)), the Supreme Court has consistently approached congressional decisions made pursuant to the national security clauses with great respect. In fact, "judicial deference to [a] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." *Rostker*, 453 U.S. at 70; *see also Weiss*, 114 S. Ct. at 760-61.

The deference mandated by the Constitution has extended to a variety of challenges to Congressional and Executive decisions: Congress' power to order members of the National Guard into service, *Perpich v. Department of Defense*, 496 U.S. 334 (1990); the President's authority as Commander in Chief to "classify and control access to information bearing on national security," *Department of the Navy v. Egan*, 484 U.S. 518, 527 (1988); Congress' decision to require only males to register for the draft, *Rostker*, 453 U.S. at 57; Congress' regulation of the conduct of military personnel under the Uniform Code of Military Justice, *Parker v. Levy*, 417 U.S. 733 (1974); and the President's discretion as Commander in Chief to grant a military commission, *Orloff v. Willoughby*, 345 U.S. 83 (1953). Courts have also held that the question of a war's legality is nonjusticiable. *Atlee v. Laird*, 347 F. Supp. 689 (E.D.Pa. 1972), *aff'd summarily sub nom. Atlee v. Richardson*, 411 U.S. 911 (1973).

Aside from the Constitution itself, the need for deference also arises from the unique role that national de-

fense plays in a democracy. Because our nation's very preservation hinges on decisions regarding war and preparation for war, the nation collectively, as expressed through its elected officials, faces " 'the delicate task of balancing the rights of servicemen against the needs of the military.' " *Weiss*, 114 S. Ct. at 761 (quoting *Solorio v. United States*, 483 U.S. 435, 447-48 (1987)). To the degree that the judiciary is permitted to circumscribe the national security options of our elected officials, it "decreases the ability of the political branches to impose their will on another [nation and at] the worst, it permits the imposition of the will of another [nation] on the United States." James M. Hirschhorn, *The Separate Community: Military Uniqueness and Servicemen's Constitutional Rights*, 62 N.C.L. Rev. 177, 237-238 (1983). After all, "[u]nless a society has the capability . . . to defend itself from the aggressions of others, constitutional protections of any sort have little meaning." *Wayte v. United States*, 470 U.S. 598, 612 (1985).

National defense decisions not only implicate each citizen in the most profound way. Such decisions also require policy choices, which the legislature is equipped to make and the judiciary is not. "Congress, working with the Executive Branch, has developed a system of military criminal and administrative law that carefully balances the rights of individual servicemembers and the needs of the armed forces." Sam Nunn, *The Fundamental Principles of the Supreme Court's Jurisprudence in Military Cases*, 29 Wake Forest L. Rev. 557, 566 (1994). While Congress and the President have access to intelligence and testimony on military readiness, the federal judiciary does not. While Congress and the members of the Executive Branch have developed a practiced expertise by virtue of their day-to-day supervision of the military, the federal judiciary has not. The judiciary has no Armed Services Committee, Foreign Relations Committee, Department of Defense, or Department of State. As the

Supreme Court has noted, "the lack of competence on the part of the courts [with respect to military judgments] is marked." *Rostker*, 453 U.S. at 65. In fact,

> it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject *always* to civilian control of the Legislative and Executive Branches.

Gilligan v. Morgan, 413 U.S. 1, 10 (1973).

Finally, the imprimatur of the President, the Congress, or both imparts a degree of legitimacy to military decisions that courts cannot hope to confer. Even when there is opposition to a proposed change—as when Congress abolished flogging in the 19th century or when President Truman ended the military's racial segregation in 1948, *see* Hirschhorn, 62 N.C. L. Rev. at 243-45—the fact that the change emanates from the political branches minimizes both the likelihood of resistance in the military and the probability of prolonged societal division. In contrast, when courts impose military policy in the face of deep social division, the nation inherently runs the risk of long-term social discord because large segments of our population have been deprived of a democratic means of change. In the military context, such divisiveness could constitute an independent threat to national security.

C.

Parallel to the deference owed Congressional and Presidential policies is deference to the decision-making authority of military personnel who "have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." *Goldman v. Weinberger*, 475 U.S. 503, 508 (1986). Judicial interference with the subordinate decisions of military authorities frustrates the

national security goals that the democratic branches have sought to achieve.

The Supreme Court has recognized the need for deference when facing challenges to a variety of military decisions: a policy that prohibited the wearing of headgear in certain circumstances, *Goldman*, 475 U.S. at 506 (noting that the military is "a specialized society separate from civilian society"); an Air Force regulation that required service members to obtain permission before circulating petitions on bases, *Brown v. Glines*, 444 U.S. 348, 357 (1980) (noting that "the military must possess substantial discretion over its internal discipline"); a base policy that prohibited certain political activity on base premises, *Greer v. Spock*, 424 U.S. 828, 837 (1976) (noting "the special constitutional function of the military in our national life"); and military court-martial proceedings, *Schlesinger v. Councilman*, 420 U.S. 738, 757 (1975) (noting that "[t]o prepare for and perform its vital role, the military must insist upon a respect for duty and discipline without counterpart in civilian life").

The need for deference also derives from the military's experience with the particular exigencies of military life. Among these is the attainment of unit cohesion—"the subordination of personal preferences and identities in favor of the overall group mission" and "the habit of immediate compliance with military procedures and orders." *Goldman*, 475 U.S. at 508. Should the judiciary interfere with the intricate mix of morale and discipline that fosters unit cohesion, it is simply impossible to estimate the damage that a particular change could inflict upon national security—"there is no way to determine and correct the mistake until it has produced the substantial and sometimes irreparable cost of [military] failure." Hirchhorn, 62 N.C. L. Rev. at 240.

D.

Here the judiciary has been asked in effect to evaluate the appropriate policy regarding homosexuality in the military. The need for circumspection is as real as in the previous military cases decided by the Supreme Court. *See Steffan v. Perry*, 41 F.3d 677, 686 (D.C. Cir. 1994) (en banc). The elected branches have already weighed the contribution that homosexual service members might make against the disruption that homosexual acts and propensities could cause. The particular policy before us is, as we have noted, the product of extensive deliberation on the part of Congress and the President. In the end, alternatives to that policy were rejected because "the maintenance of military unit cohesion—which is the key to combat capability—. . . must remain paramount over the desires of a single individual or group." H.R. Rep. No. 200, at 2074. To the extent that our renouncement of the accepted policy would require adoption of a rejected one, the damage inflicted by judicial decree on democratic decision-making will have been immense.

We likewise owe respect to the military's "estimation of the effect of homosexual conduct on military discipline." *Steffan*, 41 F.3d at 686. This estimation will be made through innumerable personnel decisions informed by the military's assessment of the unique demands of military life. Here, in accordance with military policy, the Navy instituted separation proceedings through a three-member Board of Inquiry, which heard two days of testimony and unanimously voted to honorably discharge Thomasson. The Board of Inquiry's decision was unanimously upheld by a three-member Board of Review, and the Chief of Navy Personnel signed Thomasson's discharge orders. While Thomasson now claims that he successfully rebutted the presumption created by his statement, the military boards found otherwise because Thomasson presented no specific evidence on whether he engaged in or had a propensity to engage in homosexual acts. "The federal

court is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies." *Bishop v. Wood*, 426 U.S. 341, 349 (1976); *see also Collins v. Harker Heights*, 503 U.S. 115, 129 (1992) ("The Due Process Clause 'is not a guarantee against incorrect or ill-advised personnel decisions' ") (quoting *Bishop*, 426 U.S. at 350). If this is true of state personnel decisions (in *Bishop*, a police officer fired by a city manager), it should be all the more true in military affairs, where respect for the military's internal personnel system is an essential component of the most fundamental of constitutional pursuits, national security itself.

None of this means, of course, that the statute before us may escape constitutional scrutiny. Rather, it is part of the process of constitutional scrutiny to recognize when the Constitution itself requires special deference. *Rostker*, 453 U.S. at 67. In the area of military affairs, the constitutional chartering of popular control is powerfully clear and purposefully redundant. Ultimately, "[t]he special status of the military has required, the Constitution has contemplated, Congress has created, and [the Supreme] Court has long recognized" that constitutional challenges to military personnel policies and decisions face heavy burdens. *Chappell*, 462 U.S. at 303-4. It is with those burdens in mind that we address appellant's particular arguments.

IV.

We turn first to Thomasson's contention that the statute, on its face and as applied, contravenes the Fifth Amendment's guarantee of equal protection of the laws. Thomasson claims that the stated justification for this statute—the protection of unit cohesion—is not a legitimate one because it is nothing more than a pretext for prejudice against homosexual service members. He maintains that the means chosen by Congress to promote this statutory purpose are also flawed because they treat declared homosexuals differently from heterosexuals and from homosexuals who decline to declare their sexual orientation.

A.

We address initially Thomasson's effort to invoke heightened judicial scrutiny of this statutory scheme. The searching review that is the hallmark of strict scrutiny is appropriate only in limited cases, where the statute classifies along inherently suspect lines or burdens the exercise of a fundamental constitutional right. *Heller v. Doe,* 113 S. Ct. 2637, 2642 (1993); *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985). Only a few classifications trigger heightened scrutiny. *See, e.g., Loving v. Virginia,* 388 U.S. 1, 11 (1967) (race subject to strict scrutiny); *Korematsu v. United States,* 323 U.S. 214, 216 (1944) (national ancestry and ethnic origin subject to strict scrutiny); *Clark v. Jeter,* 486 U.S. 456, 461 (1988) (illegitimacy subject to intermediate scrutiny); *Mississippi Univ. for Women v. Hogan,* 458 U.S. 718, 723-24 (1982) (gender subject to intermediate scrutiny). And because heightened scrutiny requires an exacting investigation of legislative choices, the Supreme Court has made clear that "respect for the separation of powers" should make courts reluctant to establish new suspect classes. *Cleburne,* 473 U.S. at 441; *see also Lyng v. Castillo,* 477 U.S. 635, 638 (1986) (declining to extend strict scrutiny to "[c]lose relatives"); *Massachusetts Bd. of Retirement v. Murgia,* 427 U.S. 307, 313 (1976) (per curiam) declining to extend strict scrutiny to the elderly). This reluctance has even more force when the intense judicial scrutiny would be applied to the "specialized society" of the military. *Parker,* 417 U.S. at 743.

The statutory clasisfication here is not suspect, nor does it burden any fundamental right. Section 654(b) is aimed at service members who engage in or have a propensity to engage in homosexual acts. A class comprised of service members who engage in or have a propensity or intent to engage in such acts is not inherently suspect. *See Steffan,* 41 F.3d at 684 n.3 (classification comprised of persons who engage in acts that the

military can legitimately proscribe is not suspect). Similarly, there is no fundamental constitutional right on the part of a service member to engage in homosexual acts and there is a legitimate military interest in preventing the same. Heightened scrutiny of this statute would involve the judiciary in an inventive constitutional enterprise, and it would frustrate the elected branches of government in their efforts to deal with this question. Rational basis is accordingly the suitable standard of review.

B.

It is settled law that rational basis review "is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." *F.C.C. v. Beach Communications, Inc.*, 113 S. Ct. 2096, 2101 (1993); *see also Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992); *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 175 (1980). The question is simply whether the legislative classification is *rationally related* to a *legitimate governmental interest*. *Heller*, 113 S. Ct. at 2642. Under this standard, the Act is entitled to "a strong presumption of validity," *id.*, and must be sustained if " 'there is any reasonably conceivable state of facts that could provide a rational basis for the classification,' " *id.* at 2642-43 (quoting *Beach Communications*, 113 S. Ct. at 2101). To sustain the validity of its policy, the government is not required to provide empirical evidence. "[A] legislative choice is not subject to courtroom factfinding . . . ." *Beach Communications*, 113 S. Ct. at 2102. Rather, " '[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.' " *Heller*, 113 S. Ct. at 2643 (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)).

1.

Under these standards, the Act does not violate the equal protection guarantee. Instead, it reflects a legiti-

mate legislative choice. Whether members of the judicial branch agree or disagree with that choice is irrelevant, for the Constitution envisions the rule of law, not the reign of judges. Congress, after months of discussion, concluded that those who engage in or have a propensity to engage in homosexual acts impair military readiness. The Act accordingly observes that the "long-standing" prohibition on homosexual conduct "continues to be necessary in the unique circumstances of military service." 10 U.S.C. § 654(a)(13), and that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability," 10 U.S.C. § 654(a)(15).

These judgments reflect in turn Congress' view of military life, which can be, on a round-the-clock basis, "spartan, primitive, and characterized by forced intimacy with little or no privacy." 10 U.S.C. § 654(a)(12). Out of this forced intimacy are forged the bonds that create unit cohesion, which Congress found to be a "critical element[]" of combat readiness. 10 U.S.C. § 654(a)(7). In short, "to win wars, we create cohesive teams of warriors who will bond so tightly that they are prepared to go into battle and give their lives if necessary for the accomplishment of the mission and for the cohesion of the group . . . . We cannot allow anything to happen which would disrupt that feeling of cohesion within the force." *Senate Hearings,* at 708 (Statement of Chairman of the Joint Chiefs of Staff, General Colin L. Powell). Military leaders testified time and again how unit cohesion would be undermined: "[I]n my years of military service, I have experienced the fact that the introduction of an open homosexual into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war." S. Rep. No. 112, at 280 (Statement of General H. Norman Schwarzkopf).

It was legitimate, therefore, for Congress to conclude that sexual tensions and attractions could play havoc with a military unit's discipline and solidarity. It was appropriate for Congress to believe that a military force should be as free as possible of sexual attachments and pressures as it prepared to do battle. Any argument that Congress was misguided in this view is one of legislative policy, not constitutional law. Courts have held that military authorities may discharge those who engage in homosexual acts. *Steffan*, 41 F.3d at 685 and n.4; *Meinhold v. United States Dept. of Defense*, 34 F.3d 1469, 1477 (9th Cir. 1994); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464-65 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *Dronenburg v. Zech*, 741 F.2d 1388, 1398 (D.C. Cir. 1984).

Given that it is legitimate for Congress to proscribe homosexual acts, it is also legitimate for the government to seek to forestall these same dangers by trying to *prevent* the commission of such acts. *See Steffan*, 41 F.3d at 685-86; *Ben-Shalom*, 881 F.2d at 464. The statements provision, by discharging those with a propensity or intent to engage in homosexual acts, operates in this preventive way. As the Senate Committee described the provision: "[i]t is appropriate for the armed forces to separate the individual from military service without waiting until the individual's propensity or intent . . . ripens into specific conduct prejudicial to good order and discipline." S. Rep. No. 112, at 294. This goal is itself a valid one. No constitutional constraint prohibits the military from preventing acts that would threaten combat capability. *See Greer*, 424 U.S. at 840; *see also Steffan*, 41 F.3d at 689; *Ben-Shalom*, 881 F.2d at 460-61, 464.

The conditions of military life, whether in barracks or aboard ship or in situations of collective peril, may throw service members into situations where sexual tensions are especially unwelcome. S. Rep. No. 112, at 277-80. "Many soldiers experience a forced association 24 hours a day. They work together; they eat together; they share

living space together; they train together; they shop for groceries together; they worship together. Same-gender sexual attraction in such a 'forced association' environment is something that civilians rarely experience and cannot fully understand." *Senate Hearings*, at 762 (Statement of General Gordon Sullivan). Section 654(b) thus accommodates the reasonable privacy concerns of heterosexual service members and reduces the sexual problems that may arise when some members of the unit have a propensity or intent to engage in homosexual acts and others do not. These same concerns for privacy and sexual tension explain the military's policy of providing service men and women with separate living quarters. *Id.* at 277-78.

2.

Thomasson maintains that the statements provision of § 654(b)(2) is not rationally related to the interests of unit cohesion and protection of sexual privacy, even if those interests could be seen to be legitimate. He argues that it is not rational or permissible to presume that declared homosexuals possess a unique propensity to engage in homosexual acts.

We think, however, that the means chosen by Congress in the Act are rationally related to legitimate legislative ends. The presumption that declared homosexuals have a propensity or intent to engage in homosexual acts certainly has a rational factual basis. *See Steffan*, 41 F.3d at 686; *Ben-Shalom*, 881 F.2d at 464. In fact, the presumption, which Thomasson was explicitly advised of, represents perhaps the most sensible inference raised by a declaration of one's sexual orientation. As the Senate Committee noted: "It would be irrational . . . to develop military personnel policies on the basis that all gays and lesbians will remain celibate . . . ." S. Rep. No. 112, at 284. Although Thomasson argues that some declared homosexuals have not engaged in or do not have a propensity or intent to engage in homosexual acts, "courts

are compelled . . . to accept a legislature's generalizations even when there is an imperfect fit between means and ends." *Heller*, 113 S. Ct. at 2643. As a general matter, the legislature was certainly entitled to presume that a service member who declares that he is gay has a propensity to engage in homosexual acts. While some service members have rebutted that presumption before military boards of review, *see Richenberg v. Perry*, 909 F.Supp. 1303, 1313 (D. Neb. 1995); *Able v. United States*, 880 F. Supp. 968, 976 (E.D.N.Y 1995), Thomasson did not demonstrate that he lacked a propensity to engage in homosexual acts. The general evidence offered at his discharge hearing had no bearing on this particular question.

Not only is the presumption rational, it is also permissible. Thomasson argues that it is illegitimate to separate him for a mere "propensity" to engage in acts. But in the civil context, the government can fashion general employment policies to prevent unsatisfactory conduct. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 589-92 (1979) (upholding policy barring methadone users from employment); *Vance v. Bradley*, 440 U.S. 93, 106 (1979) (upholding mandatory retirement age for Foreign Service personnel); *Massachusetts Bd. of Retirement*, 427 U.S. at 314-17 (upholding mandatory retirement age for police officers). In fact, the statement's presumption is a reasonable means of allocating the burden of proof: It places the burden on the party with the most knowledge of the facts (here the military officer), and it frees the military from engaging in detective work. In a civil setting, moreover, "the locus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne*, 424 U.S. 577, 585 (1976) (footnote omitted).

Finally, the statute is not, as Thomasson maintains, irrational due to any purported distinction between declared and undeclared homosexuals. The policy instead

rationally initiates discharge proceedings when service members, by declaring their homosexuality, thereby provide affirmative evidence to military officials of their propensity or intent to engage in homosexual acts. Thomasson apparently argues that the failure of military authorities to inquire into all service members' propensity to engage in homosexual acts somehow renders the policy unconstitutionally imprecise. But the decision to stop questioning new recruits about their sexual orientation reflects an allocation of military resources and a balance of competing interests, one that does not undermine the basic constitutionality of the Act. Under rational basis review, a classification does not fail because it "is not made with mathematical nicety or because in practice it results in some inequality." *Dandridge v. Williams,* 397 U.S. 471, 485 (1970) (citation omitted); *see Vance,* 440 U.S. at 108.

In sum, we conclude that the Act represents a legitimate legislative match of ends and means that withstands appellant's equal protection challenge.

V.

Thomasson also argues that the statute, both on its face and as applied, violates the First Amendment. He was, he contends, separated from the service for doing nothing more than declaring he was gay. According to Thomasson, the statements provision of 10 U.S.C. § 654 thus operates to suppress speech on the basis of its content and viewpoint. It does so, he asserts, by making a specific category of speech—a statement declaring a service member's homosexuality—itself a basis for discharge. As a result, he contends, the provision must serve a compelling governmental interest and must be necessary to promote that interest.

Thomasson, however, misinterprets the basic purpose of the policy. The statute does not target speech declaring homosexuality; rather, it targets homosexual acts and

the propensity or intent to engage in homosexual acts, and permissibly uses the speech as evidence. The use of speech as evidence in this manner does not raise a constitutional issue—"the First Amendemnt does not prohibit the evidentiary use of speech to establish the elements of a crime," or, as is the case here, "to prove motive or intent." *Wisconsin v. Mitchell*, 113 S. Ct. 2194, 2201 (1993); *see Dawson v. Delaware*, 503 U.S. 159, 165 (1992); *Wayte*, 470 U.S. at 610-14. Discriminatory words often provide the basis for challenges to discriminatory acts under Title VII, for instance, *see Price Waterhouse v. Hopkins*, 490 U.S. 228, 251-52 (1989) (plurality opinion), yet employers enjoy no First Amendment right to keep those words out of court. *See R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2546 (1992) (observing that "sexually derogatory 'fighting words,' among other words, may produce a violation of Title VII's general prohibition against sexual discrimination in employment practices").

There is no constitutional impediment, therefore, to the use of speech as relevant evidence of facts that may furnish a permissible basis for separation from military service. No First Amendment concern would arise, for instance, from the discharge of service members for declaring that they would refuse to follow orders, or that they were addicted to controlled substances. Such remarks provide evidence of activity that the military may validly proscribe. And, as we discussed above, the military may take measures to prevent the commission of sexual activity that it deems detrimental to its mission. Based upon this rationale, courts have consistently rejected First Amendment challenges to the use of a service member's declaration of homosexuality as a basis for separation. *See Pruitt v. Cheney*, 963 F.2d 1160, 1163-64 (9th Cir. 1991), *cert. denied*, 113 S. Ct. 655 (1992); *Schowengerdt v. United States*, 944 F.2d 483, 489 (9th Cir. 1991), *cert. denied*, 503 U.S. 951 (1992); *Ben-Shalom*, 881 F.2d at 462. A declaration of homosexuality, "like most admissions, [is] made in speech," noted one such court, "but

that does not mean that the first amendment precludes the use of the admission as evidence of the facts admitted." *Pruitt*, 963 F.2d at 1164.

Thomasson asserts, however, that this reasoning is not applicable to the new policy. He points to language in the DoD Directive stating that "sexual orientation is considered a personal and private matter" and "is not a bar to continued service." DoD Dir. 1332.30, Enc. 2 ¶ C, at 2-1. He infers from this language that speech disclosing one's homosexuality admits to nothing unlawful, and hence lacks any evidentiary value. According to Thomasson, the policy thus at bottom distinguishes declared homosexuals from undeclared homosexuals, penalizing only the former on the basis of their speech.

While imaginative, Thomasson's argument fails to alter our conclusion that the new policy is in fact directed at the propensity or intent of service members to engage in homosexual acts, and uses speech declaring homosexuality as evidence thereof. First, Thomasson's charge that such a declaration lacks any evidentiary value is patently erroneous. As we explained in rejecting Thomasson's equal protection challenge, a service member's statement that he is a homosexual has substantial evidentiary value regarding whether he has a propensity to engage in homosexual acts—"the military may reasonably assume that when a member states that he is a homosexual, that member means that he either engages or is likely to engage in homosexual conduct." *Steffan*, 41 F.3d at 686; *see Ben-Shalom*, 881 F.2d at 464.

Second, the statutory provision does *not* at its core distinguish between declared and undeclared homosexuals, the central premise of Thomasson's First Amendment argument. Instead, it distinguishes service members who have a propensity or intent to engage in homosexual acts from other members, and uses a declaration of homosexuality as evidence. The statute's operation confirms as much. Service members who state that they are homo-

sexual can avoid separation by rebutting the presumption that they have a propensity or intent to engage in homosexual acts. 10 U.S.C. § 654(b)(2); DoD Dir. 1332.30, Enc. 2 ¶ C.1.b., at 2-2. Although Thomasson chose not to come forward with evidence in this regard, other members subject to discharge under the statements provision have successfully demonstrated that they lack a propensity or intent to engage in homosexual acts. *See Richenberg*, 909 F. Supp. at 1313; *Able*, 880 F. Supp. at 976.

Moreover, service members who have never spoken about their sexual orientation are still subject to separation if they are found to have engaged or attempted to engage in homosexual acts. 10 U.S.C. § 654(b)(1); DoD Dir. 1332.30. Enc. 2 ¶ C.1.a., at 2-2. In a similar vein, service members who have not publicly declared their homosexuality are nevertheless subject to discharge if they have made private statements to that effect, when those statements are brought to the attention of commanding officers and the evidence regarding any such private statement is credible. *See* S. Rep. No. 112, at 291-92. Again, the statute's essential concern is not with speech declaring homosexuality, as Thomasson alleges, but is instead with the propensity or intent to engage in acts which Congress has deemed detrimental to the military's mission.

Because the statute aims at this propensity, not at speech, it is not a viewpoint-based or content-based regulation. With respect to the former, the statute's treatment of a declaration of homosexuality is not based on a desire to suppress any viewpoint that the statement might convey. The declaration asserts a fact, one that the military uses as evidence of a propensity or intent to engage in homosexual acts. The military, however, allows service members to express views on issues that affect homosexuals. As the district court found, members are "free to affiliate with a group that opposes the policy, to make statements criticizing the policy, to attend demonstrations in favor of homosexual rights, to read homosexual news-

papers, or engage in other such expressive activities." 895 F. Supp. at 825; *see* DoD Dir. 1332.30, Enc. 8, ¶ C.3.d., at 8-2; *see also Assessment of the Plan: House Hearings*, 35-37 (Statement of Gen. Colin Powell).

The statute likewise does not discriminate on the basis of the content of speech. Whenever a provision prohibits certain acts, it necessarily chills speech that constitutes evidence of the acts. A regulation directed at acts thus inevitably restricts a certain type of speech; this policy is no exception. But effects of this variety do not establish a content-based restriction of speech. In *Wayte v. United States*, for example, the Supreme Court rejected a First Amendment challenge to the government's policy of prosecuting only those violators of draft registration laws who either reported themselves or were reported by others. 470 U.S. at 610-14. The petitioner, Wayte, alleged that the policy "inevitably created a content-based regulatory system" with a "content-based impact on non-registrants" such as himself. *Id.* at 611. But the Supreme Court treated the policy as a content-neutral regulation, observing that letters informing the government of an intent not to obey conscription requirements "provided strong, perhaps conclusive evidence of the nonregistrant's intent not to comply—one of the elements of the offense." *Id.* at 612-13.

A regulation is thus "content-neutral so long as it is '*justified* without reference to the content of the regulated speech,' " even if it has an "effect on some speakers or messages but not others." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (citations omitted) (emphasis in original). For instance, the Supreme Court deemed to be content-neutral an ordinance that distinguished adult film theaters from other kinds of theaters, as the regulation was 'aimed not at the *content* of the films' but at the "*effects* of such theaters on the surrounding community." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47 (1986) (emphasis in original). The civil rights

laws also penalize a specific type of speech in certain contexts—speech expressing discriminatory views—yet the Supreme Court regards Title VII "as an example of a permissible content-neutral regulation." *Mitchell*, 113 S. Ct. at 2200; *see R.A.V.*, 112 S. Ct. at 2546. The military policy here is justified on a content-neutral, non-speech basis: preventing the disruptions that homosexual activity among service members might have on military readiness. That the policy may hinge the commencement of administrative proceedings on a particular type of statement does not convert it into a content-based enactment. *See Wayte*, 470 U.S. at 610-14.

Thomasson's constitutional challenge faces yet another hurdle. Members of the armed services have never possessed all the First Amendment rights of the civilian population. Rather, the Supreme Court has made clear that special First Amendment considerations surround the military environment. The Supreme Court has characterized its "review of military regulations challenged on First Amendment grounds" as "far more deferential than constitutional review of similar laws or regulations designed for civilian society." *Goldman*, 475 U.S. at 507. In *Brown v. Glines*, for instance, the Supreme Court upheld against a First Amendment challenge Air Force regulations that required service members to obtain permission from their base commanders before circulating petitions, noting that " '[s]peech that is protected in the civil population may . . . undermine the effectiveness of response to comand.' " 444 U.S. at 354 (citations omitted). In general, the Court observed, "while members of the military services are entitled to the protections of the First Amendment, 'the different character of the military community and of the military mission requires a different application of those protections.' " *Id.* (quoting *Parker*, 417 U.S. at 758).

Finally, even with respect to non-military public employment, government may restrict certain types of speech

to promote the effective performance of its function. *See Waters v. Churchill*, 114 S. Ct. 1878 (1994); *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1968). In such cases, courts must give "full consideration" to "the government's interest in the effective and efficient fulfillment of its responsibilities to the public." *Connick*, 461 U.S. at 150. Indeed, "where the government is employing someone for the very purpose of effectively achieving its goals," restrictions on speech "may well be appropriate." *Waters*, 114 S. Ct. at 1888 (plurality opinion). Congress expressly found that the statute at issue here was justified on grounds relating to performance of the military function, perhaps the most important of all governmental responsibilities. 10 U.S.C. § 654(a)(15). For the same reasons we identified in rejecting Thomasson's equal protection claim, the use of statements of one's homosexuality as evidence of a propensity or intent to engage in homosexual acts is justifiable under the standards associated with content-neutral military rules, *see Glines*, 444 U.S. at 354-55, and as an allowable means of furthering the nation's military mission.

VI.

In a final series of catch-all claims, Thomasson alleges that the Act violates basic guarantees of due process and procedural fairness conferred by the Constitution and the Administrative Procedure Act. 5 U.S.C. §§ 551 *et. seq.* First, he contends that it is irrational to presume that one who states that he is a homosexual engages in or has a propensity or intent to engage in homosexual acts. Second, he maintains that the presumption is rebuttable only in theory, and is irrebuttable in practice. Finally, he alleges that his discharge was arbitrary and capricious and unsupported by substantial evidence.

We have already rejected much of the substance of these allegations in our discussion of Thomasson's equal protection and First Amendment claims. The policy's

rebuttable presumption is entirely rational, as we have explained in ruling on Thomasson's equal protection challenge. The proceedings complied with any requirements imposed by the Administrative Procedure Act—Thomasson received a full and adequate hearing in which substantial evidence established that he stated that he was a homosexual and that he failed to rebut the presumption triggered thereby. *See Thomasson*, 895 F. Supp. at 831. In short, Thomasson's claims that his discharge violated due process and the Administrative Procedure Act are without merit.

VII.

We have carefully reviewed Thomasson's various claims, but we cannot accept them. To do so would not only overturn the efforts of the elected branches of government to resolve a significant question of national military policy. It would also violate much plain and settled Supreme Court precedent. In the end, the best service courts can render is to return this debate to where it all began—to the halls of democratic governance, where the many Americans affected by decisions such as these can participate directly in their resolution.

The judgment of the district court is hereby affirmed.

AFFIRMED

MURNAGHAN, Circuit Judge, concurring:

I concur. Because an extended discussion of judicial deference to the military is unnecessary, I would dispose of the matter much more simply. The case concerns a rebuttable presumption which Thomasson did not rebut. Whether the employer was a military or non-military body, it is enough that the presumption used is rational and thus constitutional.

LUTTIG, Circuit Judge, concurring:

The statute governing homosexuals in the Armed Services that was enacted by the Congress of the United States and signed by the President forbids known homosexuals from serving in the military. As Lt. Thomasson has steadfastly maintained, the statute, and the policy it embodies, is not at all conduct-based in the sense now argued by the Executive Branch, assertedly on behalf of the Congress. The statute requires the discharge of homosexual service members who merely say that they are homosexual or otherwise evidence their homosexuality, regardless of whether they have actually engaged in homosexual conduct or are likely to engage in any such conduct.

The requirement that, in order to be discharged, one must at least demonstrate a likelihood to engage in homosexual acts exists only in a regulation promulgated by the Administration, ostensibly in implementation of the statute. That regulation redefines the statutory term "propensity" so that only those homosexual service members who are *likely* to engage in homosexual acts will be discharged. Through this regulation the Administration has effectively secured the very policy regarding military service by homosexuals that it was denied by the Congress.

Rather than continue to indulge the politically expedient fiction that the congressionally-mandated policy bars from service only those known homosexuals who are likely to engage in homosexual acts—a fiction that both of these parties urge upon us because it serves their mutual interest in creating a sanctuary for homosexuals within the military—I would simply invalidate the Administration's regulation as in excess of its statutory authority. Then, having done so, I would sustain the policy that was actually enacted into law as a permissible exercise of Congress' constitutional authority "To make Rules for the Government and Regulation" of the military. U.S. Const. art. I, § 8, cl. 14. As the Solicitor General

maintained at argument, and as the courts have uniformly held in analogous contexts, it is well within the plenary authority of the Congress to exclude homosexuals from military service because of the deleterious effects that knowledge of their attraction for members of the same sex has on unit cohesion and military effectiveness.

The Administration stridently argues that the question of the validity of the regulation is not before us. Thomasson, however, unequivocally draws into question the validity of the regulation through his argument that, despite the conduct-based regulation, the military's policy is status-based:

> *The [Family Research] Council asserts that the Department of Defense and Navy regulations at issue in this case conflict with the Congressional intent of the statute* that is also at issue. . . . In support of its motion, the Council asserts that the parties have overlooked this point. In fact, however, *this point was raised in Lt. Thomasson's brief and was extensively addressed by both parties at the prior argument in this appeal. See, e.g.*, Brief for Appellant at 45 n.47, 45-49.

Appellant's Resp. to Mot. of *Amicus Curiae* Family Research Council for Leave to Participate in Oral Argument at 2 & n.1 (emphasis added). And the Administration defends its policy entirely on the grounds that the regulation is the source of the conduct-based rationale for the policy. Thus, both parties clearly believe that the constitutionality of the "Don't Ask; Don't Tell" policy turns upon the regulatory redefinition of "propensity" to mean a likelihood of future conduct.

I.

For as long as it has had a military, the United States has excluded homosexuals from military service. During the 1992 election campaign, then-Governor Clinton said

that, if elected, he would repeal this long-standing ban on homosexuals, *see* S. Rep. No. 112, 103d Cong., 1st Sess. 267 (1993), and, true to his promise, slightly more than a week after assuming office President Clinton announced in his first press conference that he was directing Secretary of Defense Aspin to prepare an Executive Order "ending discrimination [in the military] on the basis of sexual orientation." Memorandum on Ending Discrimination in the Armed Forces, 1 Public Papers of the Presidents, William J. Clinton, Jan. 29, 1993, at 23 ("Pub. Papers"); *see also* J.A. at 335.[1] During this press conference, *see* The President's News Conference, 1 Pub. Papers 20, 21 (Jan. 29, 1993), President Clinton embraced as consistent with his own views the distinction between homosexual status and homosexual conduct drawn by the federal District Court for the Central District of California in a decision that had been rendered only the previous day. *See Meinhold* v. *United States Department of Defense*, 808 F. Supp. 1455, 1458 (C.D. Cal. 1993), *aff'd in part and vacated in part*, 34 F.3d 1469 (9th Cir. 1994). In *Meinhold*, the district court had enjoined the Department of Defense from discharging homosexuals based on sexual orientation, absent any evidence of homosexual conduct.

A political firestorm erupted over the President's announced plans to lift the ban on homosexuals. Congress, for its part, convened hearings to consider the effect that the President's proposed elimination of the ban would have on military capability. It also created a Military Working Group to consider the President's proposal, which, on July 1, 1993, released a report concluding that

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[1] President Clinton adopted an interim policy effective until July 15, 1993, that retained the prior ban on service by homosexuals, with two modifications: 1) new recruits would not be questioned about their sexual orientation; and 2) homosexuals who had not engaged in homosexual acts would be processed through separation from active duty, but would be placed in the Standby Reserve during the interim period. S. Rep. No. 112 at 268.

"*the presence of open homosexuals* in a unit would, in general, polarize and fragment the unit and destroy the bonding and singleness of purpose required for effective military operations." Summary Report of the Military Working Group 5 (July 1, 1993) (emphasis added).

Despite the conclusion of the Military Working Group that the mere presence of homosexuals would detrimentally affect unit cohesion, the "Policy on Homosexual Conduct in the Armed Forces" transmitted by Secretary Aspin to the Secretaries of the Army, Navy and Air Force and to the Chairman of the Joint Chiefs of Staff on July 19, 1993, provided as follows:

> [I]t is the policy of the Department of Defense to judge the suitability of persons to serve in the armed forces on the basis of their conduct. Homosexual conduct will be grounds for separation from the military services. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to service entry or continued service unless manifested by homosexual conduct.

Memorandum from The Secretary of Defense, July 19, 1993, at 1 ("July 19th Memorandum"), *reprinted in* Assessment of the Plan to Lift the Ban on Homosexuals in the Military: Hearings Before the Military Forces and Personnel Subcomm. of the House Comm. on Armed Services, 103rd Cong., 1st Sess. 22 (1993) (H.A.S.C. No. 103-19). At a press conference that same day, President Clinton himself announced the new policy, explainnig that "service men and women [under the new policy] will be judged based on their conduct, not their sexual orientation," and suggesting strongly that known homosexuals could remain in military service provided they did not engage in conduct violative of the Uniform Code of Military Justice. Remarks Announcing the New Policy on Homosexuals in the Military, 1 Pub. Papers 1109, 1111 (July 19, 1993); *see id.* at 1109 ("[The new policy] provides greater protection to those who happen to

be homosexual and want to serve their country honorably in uniform, *obeying all the military's rules against sexual misconduct*." (emphasis added)).

Concerned that the new policy as described by the President would allow open homosexuals to serve in the military, Congress questioned Administration officials at length on the precise meaning of the new policy, enacting the legislation that we now have before us only after it was convinced that the new policy would retain the ban on service by homosexuals. *See, e.g.*, S. Rep. No. 112 at 289 ("Based upon the testimony [by Secretary Aspin, the Joint Chiefs of Staff, the General Counsel of the Department of Defense, and the Military Working Group] received at the hearing, the committee finds that the Department of Defense has retained the central features of its policy concerning homosexuality in the armed forces," namely, "mandatory discharge" for "homosexual acts, marriages, and statements that demonstrate a propensity to engage in homosexual acts."). Congress thus codified the long-standing ban against service by homosexuals, 10 U.S.C. § 654, adopting in an uncodified "sense of Congress" provision the President's interim policy ceasing the questioning of new recruits about their sexual orientation. National Defense Authorization Act for Fiscal Year 1994, Pub. L. No. 103-160, § 571 (d)(1), 107 Stat. 1547, 1673 (1993). Even so, Congress included a proviso that the Secretary of Defense could reinstate the questioning of new recruits if, in the Secretary's view, such ultimately proved necessary to implement the statutory ban on service by known homosexuals. *See id.*[2]

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[2] Section 571(d) provides, in relevant part:

SENSE OF CONGRESS.—It is the sense of Congress that—

(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary deter-

It is this statutory policy enacted by Congress, not the policy advocated by President Clinton in January 1993 or the policy implemented by the Secretary through regulation, that was signed into law on November 30, 1993.

II.

A.

Section 571(a) of the National Defense Authorization Act for Fiscal Year 1994, 10 U.S.C. § 654, like the pre-1993 Department of Defense Directives it codifies, unambiguously prohibits all known homosexuals from serving in the military, regardless of the likelihood that they will violate the Uniform Code of Military Justice prohibition against sodomy, *see* Article 125, U.C.M.J., 10 U.S.C. § 925, or engage in other homosexual acts as defined by the statute, *see* 10 U.S.C. § 654(f)(3).[3] The statute defines "homosexual" as "a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." *Id.* at § 654(f)(1). It then provides that a service member who states that he is homosexual (or otherwise evidences his homosexuality)[4] shall be separated from service un-

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mines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code.

[3] "Homosexual act" is defined by the statute as:

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

10 U.S.C. § 654(f)(3). The relevant portion of the U.C.M.J. prohibits only "sodomy," defined as "unnatural carnal copulation with another person of the same or opposite sex or with an animal." *Id.* at § 925.

[4] *See* DoD Directive 1332.30, Encl. 1, ¶ 18 (March 4, 1994) ("Statement that a Member Is a Homosexual or Bisexual or Words

less he demonstrates that he is not, *as statutorily defined*, a "homosexual":

> A member of the armed forces shall be separated . . . if [*inter alia*] . . . the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless . . . the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

Id. at § 654(b)(2) (the "statements" provision). The presumption that one is homosexual which arises from one's statement of homosexuality, in other words, can be rebutted *only* by proving that one does not even have a propensity to engage in homosexual acts. *See* S. Rep. No. 112 at 294 ("[O]nce the government introduces evidence that the member has stated that he or she is a homosexual, the burden shifts to the member . . . to demonstrate that he or she is not a homosexual as defined in the statute."); *id.* ("[T]he member bears the burden of persuading the fact-finder by a preponderance of the evidence that the rebuttal is more credible than the original statement (*e.g.*, by proving that the original statement was made in jest).").[5] The statute in this manner bars ser-

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to That Effect" defined as "Language or behavior that a reasonable person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.").

[5] *See also* Policy Concerning Homosexuality in the Armed Forces: Hearings Before the Senate Comm. on Armed Services, 103rd Cong., 1st Sess. 753 (1993) (S. Hrg. 103-845) (testimony of Secretary Aspin) ("The point of rebuttable presumption is that if the issue comes to the attention of the authorities and the authorities say you have just said you are gay, you have the opportunity to present some evidence to the contrary."); *id.* at 746 (Secretary Aspin answering "Correct" to Senator Bryan's query: "So, the rebuttable presumption is a rebuttable presumption that the individual then, in effect, would carry the burden of establishing that he or she was not homosexual?").

vice not just of those individuals likely to engage in homosexual acts, but rather, of all acknowledged (or otherwise known) homosexuals. That the statute is aimed at known homosexuals, rather than homosexual acts, is further confirmed by the fact that, pursuant to section 654 (b)(1), a heterosexual who actually engages in homosexual acts is not barred from service if he demonstrates *inter alia* that he is not a homosexual.[6]

In baring all known homosexuals from military service, the statute is identical to the pre-1993 DoD policy:

> Homosexuality is incompatible with military service. . . . A member shall be separated . . . if . . . [t]he member has stated that he or she is a homosexual or bisexual unless . . . the member is not a homosexual or bisexual.

DoD Directive 1332.14 (March 9, 1982), *reprinted in* 32 C.F.R. Ch. 1, Pt. 41, App. A, ¶¶ H.1.a. and H.1.c.(2) (1994). Indeed, in the following colloquy with Senator Nunn during the Senate hearings on the "Don't Ask; Don't Tell" policy, the General Counsel for the Department of Defense, Jamie Gorelick, confirmed that the current policy is the same as the prior policy in this critical respect:

> CHAIRMAN NUNN. Under [the pre-1993] DoD policy, if there is a finding that an individual has stated that he or she is homosexual, that person is discharged *unless there is further finding that the individual is not, in fact, homosexual*, that is, the person does not engage in homosexual acts or have an intent or desire to do so. Is that correct?
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> MS. GORELICK. That is correct.
>
> . . .

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[6] Of course, a heterosexual would be subject to discharge under Article 125 of the U.C.M.J., 10 U.S.C. § 925, if the homosexual act he commits is sodomy.

> CHAIRMAN NUNN. In other words, the [pre-1993] policy establishes a rebuttable presumption that a person who says he or she is homosexual is, in fact, homosexual. Is that correct?
>
> MS. GORELICK. That is what the current policy does. And, as the Secretary says, *that is carried forward into the new policy.*

S. Hrg. 103-845 at 771 (emphasis added). Secretary Aspin also affirmed that the policy disqualifies from service all known homosexuals, agreeing in response to questions from Senator Gramm that, under the policy, military personnel "would at least be assured that no one would be a self-professed homosexual and be allowed to continue to serve." *Id.* at 727; *see also id.* at 746-47 (Secretary Aspin confirming that the rebuttable presumption in the current policy is the same as that in the prior policy).

The fact that the statute excludes known homosexuals from service because they are homosexual and not only because they engage in homosexual acts is reinforced in the statutory findings made by Congress:

> The *presence* in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts [— that is, of "homosexuals," as statutorily defined—] would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

10 U.S.C. § 654(a)(15) (emphasis added); *see also* S. Rep. No. 112 at 293 ("The [legislative] findings reflect long standing Department of Defense policy, as set forth in [the pre-1993] DoD Directive[s], that '[h]omosexuality is incompatible with military service . . . [because the] presence in the military environment of persons who engage in homosexual conduct or who, by their statements, demonstrate a propensity to engage in homosexual con-

duct, seriously impairs the accomplishment of the military mission.' "); H.R. Rep. No. 200, 103d Cong., 1st Sess. 287 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 2013, 2074 ("[T]he committee concludes that homosexuality is incompatible with military service.").[7]

And there is abundant support for this statutory finding in the legislative record. *See, e.g.*, S. Rep. No. 112 at 278 (testimony of General Colin Powell); *id.* at 280 (testimony of General H. Norman Schwarzkopf); S. Hrg. 103-845 at 780 (testimony of General John Otjen); MWG Summary Report at 5; *see generally Able*, 880 F. Supp. at 977 (describing the disruptive effect to unit cohesiveness caused by the mere presence of homosexuals in the military as "a theme repeatedly stated by high-ranking officers").

Thus, the "Don't Ask; Don't Tell" policy enacted into law, as opposed to the policy that has been put in place by the Administration, is not conduct-based in the constitutionally significant sense that homosexuals may only be discharged based upon their commission of homosexual acts or their likelihood to commit such acts, or even in the sense that its purpose is to prevent homosexual conduct before it occurs. As Lt. Thomasson correctly observes, this "focus on conduct [is but] a lawyer-driven, pretextual afterthought" by the Administration. Appel-

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[7] *See also* Memorandum for the President from Attorney General Janet Reno, Defensibility of the New Policy on Homosexual Conduct in the Armed Forces 1 (July 19, 1993), *reprinted in* S. Hrg. 103-845 at 706 ("The policy reiterates the prior Defense Department view that 'homosexuality is incompatible with military service because it interferes with the factors critical to combat effectiveness.' "); Appellant's Br. at 26 ("[T]he long history of the policy—including even the recent legislative history surrounding the [1993] Act—establishes beyond any doubt that the chief concern among policymakers has always been to combat the mere *presence* of homosexuals in the ranks." (citing, *inter alia*, *Able* v. *United States*, 880 F. Supp. 968, 976-80 (E.D.N.Y. 1995))).

lant's Br. at 26; *see also Able*, 880 F. Supp. at 977 ("[T]he lawyers evolved the Byzantine and complex [regulatory] provisions" in order "to pretend that the concern was [not over] the mere presence of homosexuals in the Services, but [over] their potential acts."). *Compare* Gov't Br. at 23 ("Thomasson's repeated assertion that the policy classifies on the basis of homosexual orientation cannot be reconciled with the plain *regulatory* language that equates 'propensity' with 'likelihood.'" (citations omitted) (emphasis added)).

The statutory policy is "conduct-based" (if it can be so characterized at all) only in the sense that the service member must *evidence* his homosexual propensity in some manner, if only by a statement, before he will be discharged. *See* DoD Directive 1332.30, Encl. 1, ¶ 9, Encl. 2, ¶ C, and Encl. 6, ¶ B.4 (March 4, 1994) (defining "homosexual conduct" so as to include "statements"); MWG Summary Report at 4 (same); S. Rep. No. 112 at 289 (same); *see also* S. Hrg. 103-845 at 817 (testimony of Jamie Gorelick) ("[W]hen we talk about separating status from conduct, we are talking about separating orientation from homosexual acts, *statements*, and marriages." (emphasis added)); *id.* at 807 (testimony of Jamie Gorelick) ("[T]he policy has always been defended on the basis that it is homosexual conduct—acts, *statements*, and marriages—that is the basis of discharge under the current policy." (emphasis added)). Such a policy is, as between pure status and pure conduct, a status-based policy, because it merely recognizes certain conduct as evidence of homosexuality; it does not exclude on the basis of that conduct itself. To say that the policy is status-based in this sense, as opposed to conduct-based in the sense argued by the Administration, of course, is not to say that the policy is status-based in the same way that an exclusion on the basis of an immutable characteristic would be. Rather, it is to say that the policy is based upon what is in fact a hybrid of status and conduct, namely, "propensity." "Propensity" is different from a

predetermined and immutable characteristic like race or sex, in that it is a disposition toward certain conduct; but it is also different from conduct itself, or its likelihood, because it is neither itself action nor necessarily indicative of likely future action. It is, as commonly understood, merely an inclination, *see infra*, and it is that inclination, that propensity, not any likelihood of conduct, at which this particular policy is directed.

That the enacted policy is conduct-based only in the sense that there must be some manifestation of one's homosexuality should not be surprising. The whole of the compromise between the Congress and the President was that the military would no longer question a new recruit or service member about his sexual orientation absent some manifestation by him of homosexuality, but that discharge would be mandated if a service member evidenced his homosexuality in any way at all—through even as little as a statement—unless he could prove that he was not homosexual. Thus, the policy: "Don't Ask, Don't Tell."

B.

The Administration fully understands that the policy enacted by Congress is not conduct-based in the sense that it is targeted at homosexual acts and the likelihood that one will commit such acts, as evidenced by its repeated mischaracterization of the statute itself and its effective misquotation of the testimony of the various witnesses and legislators on this important if not dispositive issue. On virtually every occasion when the Administration references either a statutory provision or a passage from testimony wherein Congress or a witness observed that the presence of open homosexuals would be detrimental to combat capability or unit cohesion, it substitutes its regulatory definition of "propensity" (*i.e.*, a likelihood that one will engage in homosexual acts) for the words actually enacted or spoken.

The Administration states, for example, that,

> [t]he classification here is directed at homosexual "acts and the likelihood of acts" and *is grounded in the congressional finding that the presence in the military of persons who engage in, or are likely to engage in, such acts* "would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. 654(a)(15).

Gov't Br. at 16-17 (emphasis added). In fact, the statutory finding referenced by the Administration in this passage is not that an unacceptable risk would be created by the presence of persons likely to engage in homosexual acts; rather, the finding is that the risk would be created by "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts." 10 U.S.C. § 654(a)(15).

Similarly, the Administration describes General Powell's Senate testimony in this way:

> In General Powell's experience, *service by persons who engage in, or are likely to engage in, homosexual acts*, "would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces." S. Rep. 112 at 278. *See also id.* at 281.

Gov't Br. at 37 (emphasis added); *see also id.* at 3 (same). General Powell actually stated not that the service of persons likely to engage in homosexual acts would be detrimental to unit cohesion, but rather that,

> *the presence of open homosexuality* would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces.

S. Rep. No. 112 at 278 (emphasis added).

Repeating the mischaracterization, the Administration recites again, later, that "General Powell stated that 'it would be prejudicial to good order and discipline' if the

military required heterosexuals *and persons who do, or are likely to, engage in homosexual acts* 'to share the most private facilities together, the bedroom, the barracks, latrines, and showers.' " Gov't Br. at 38 (quoting from S. Rep. No. 112 at 283) (emphasis added). General Powell actually stated:

> [I]t is very difficult in a military setting, where you don't get a choice of association, where you don't get a choice of where you live, to introduce a group of *individuals* who are proud, brave, loyal, good Americans, but *who favor a homosexual life style*, and put them in with heterosexuals who would prefer not to have somebody of the same sex find them sexually attractive, put them in close proximity, [and] ask them to share the most private facilities together, the bedroom, the barracks, latrines, and showers.
>
> I think that it is a very difficult problem to give the military. I think it would be prejudicial to good order and discipline to try to integrate *that* in the current military structure.

S. Rep. No. 112 at 283 (emphasis added); *see also* Appellant's Reply Br. at 13 ("[The government has] simply and repeatedly misrepresented General Powell's testimony in an effort to suggest [that the policy is based on conduct, not on mere acknowledgements of sexual orientation, irrespective of conduct].").

The Administration misrepresents General Schwarzkopf's testimony in the same manner. It apprises the court that,

> General Schwarzkopf similarly testified, based on his consistent experience over years of military service, that the presence of *such* homosexuals [viz., "persons who engage in, or are likely to engage in, homosexual acts"] in a military unit "polarizes that unit and destroys the very bonding that is so im-

> portant for the unit's survival in time of war." [S. Rep. 112] at 280.

Gov't Br. at 37 (emphasis added). General Schwarzkopf actually stated:

> [I]n my years of military service, I have experienced the fact that the introduction of an *open homosexual* into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war.

S. Rep. No. 112 at 280 (emphasis added).

Likewise, the Solicitor General says that General Schwarzkopf testified that, "where *such* homosexuals [again, those who either engage in or are likely to engage in homosexual acts] served in military units, 'morale broke down, and unit effectiveness suffered,' " Gov't Br. at 37 (emphasis added), when in fact General Schwarzkopf testified that, "in every case [he was] familiar with, . . . *whenever it became known in a unit that someone was openly homosexual*, polarization occurred, violence sometimes followed, morale broke down, and unit effectiveness suffered." S. Rep. No. 112 at 280 (emphasis added).

Such mischaracterization appears repeatedly throughout the government's submissions.

It is self-evident that this mischaracterization is purposeful. The deliberateness of the mischaracterization is also borne out, however, by the fact that when the Administration responded to congressional leaders whom it knew to be opposed to its position on military service by homosexuals, *it substituted the statutory language for the regulatory language, rather than the regulatory language for the statutory language as it does before this court.* Senators Thurmond, Nunn and Coats, on behalf of the Senate's Committee on Armed Services, asked the Department's General Counsel "[h]ow . . . the implementing directives and related guidance address . . . [t]he circum-

stances in which a person who states that he or she is a homosexual claims that the rules preclude separation of anyone based on their 'sexual orientation.' " Letter from DoD General Counsel Judith A. Miller to Senators Thurmond, Nunn and Coats 1, 2 (July 27, 1995) (reciting questions from Thurmond, Nunn and Coats letter of July 13, 1995). When DoD answered this question, it did so with what is almost a verbatim quotation from its regulation, altered only so as to substitute the statutory language for the final clause of the regulation, which refers to the possibility of rebuttal through proof that one is not *likely* to engage in homosexual acts. The regulation provides, of course, that,

> [i]n determining whether a member has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered: (a) Whether the member has engaged in homosexual acts; (b) The member's credibility; (c) Testimony from others about the member's past conduct, character and credibility; (d) The nature and circumstances of the member's statement; [and] (e) *Any other evidence relevant to whether the member is likely to engage in homosexual acts.*

DoD Directive 1332.14, Enc. 3, Att. 1, ¶ H.1.b.(2) (March 4, 1994) (emphasis added). The Department of Defense General Counsel, however, replied to the Senators as follows:

> In determining whether a Service member has successfully rebutted the presumption, a Board may consider, among other evidence: whether the member has engaged in homosexual acts; the member's credibility; testimony from others about the member's past conduct, character and credibility; the nature and circumstances of the statement; and any other evidence relevant to whether the member engages in, attempts

> to engage in, *has a propensity to engage in*, or intends to engage in homosexual acts.

Letter from DoD General Counsel Judith A. Miller to Senators Thurmond, Nunn and Coats 3 (July 27, 1995) (emphasis added).

III.

Despite Congress' clear mandate requiring the discharge of all known homosexuals, the Department of Defense has, by its regulatory redefinition of the statutory term "propensity," created what is in effect a sanctuary for known homosexuals whom the military determines are not *likely* to engage in homosexual acts. *See* Gov't Br. at 27 ("Both on the face of the policy and in actual practice, the rebuttable presumption allows a service member who has stated that he is homosexual an opportunity to be retained in the service by showing that he does not engage in, and is not likely to engage in, homosexual acts.").[8] Because

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[8] The Solicitor General contends that there is a difference between a homosexual "orientation" and a homosexual "propensity" insofar as the likelihood that one will engage in homosexual acts is concerned, a difference the Administration has incorporated into its regulatory definition of "orientation." *See* DoD Directive No. 1332.30, Encl. 1, ¶ 16 (March 4, 1994) (defining "sexual orientation" as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts"). I do not know what homosexual orientation is, if it is not the propensity to commit homosexual acts; indeed, I do not understand how one even knows that he has a homosexual orientation except by realizing that he has a propensity toward the commission of homosexual acts. *See Able*, 880 F. Supp. at 975 (characterizing the distinction between "orientation" and "propensity" as "Orwellian"). But if there are indeed persons who are homosexually oriented but do not have a homosexual propensity, I would agree that the statute does not require their discharge, at least under the statements provision. I would also agree that if, as Deputy Attorney General Gorelick testified, a homosexually-oriented person is merely an undetected homosexual, the statute accepts the continued service of such persons as a consequence of the compromise that service members would not be asked about

it is unmistakable that, under the statute enacted by Congress, such homosexuals may not remain in service of the military, I would invalidate this regulation as an impermissible exercise of the regulatory authority conferred upon the Secretary.

A.

The regulation promulgated by the Secretary defines the statutory phrase "propensity to engage in homosexual acts" to mean "a likelihood" that one will engage in homosexual acts:

> Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates *a likelihood* that a person engages in or will engage in homosexual acts.

DoD Directives 1332.30, Enc. 1, ¶ 13 (March 4, 1994) (emphasis added).[9] By so defining "propensity," the Secretary has, contrary to the clear intent of the Congress, effectively transformed a provision that permits rebuttal of the presumption of homosexuality only by proof that one is not a member of the class (*i.e.*, not a homosexual), into a provision that permits individualized rebuttal of the presumption merely by proof that one is not likely to engage in homosexual acts.

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their sexual orientation. *See* S. Hrg. 103-845 at 808 (Gorelick testimony); *see also* Memorandum for the President from Attorney General Janet Reno, Defensibility of the New Policy on Homosexual Conduct in the Armed Forces 1 (July 19, 1993), *reprinted in* S. Hrg. 103-845 at 706 ("[H]omosexual conduct (but not an unmanifested orientation) would be grounds for separation from service.").

[9] *See also* DoD Directive 1332.30, Enc. 2, ¶ C (March 4, 1994) ("A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts.").

Quite obviously, "propensity" does not mean "a likelihood," and it certainly does not mean, as the Administration maintains, "likely"; nor can the term reasonably be defined in either of these ways. As common sense suggests, "propensity" is merely "a natural inclination" or an "innate or inherent tendency." *Webster's Third New Int'l Dictionary, Unabridged* 1817 (1986); *see also The Oxford English Dictionary* 637 (2d ed. 1989) (defining "propensity" as "disposition or inclination to some action, course of action, [or] habit"); *The American Heritage Dictionary* 1452 (3d ed. 1992) (defining "propensity" as "an innate inclination; a tendency"); *Able*, 880 F. Supp. at 975 (" '[P]ropensity' is generally understood and defined to mean a 'natural inclination' or an 'innate or inherent tendency.' "). *Compare Oxford English Dictionary* at 345 "homosexual" as a "[a] person who has a sexual *propensity* for his or her own sex" (emphasis added)); *Webster's Dictionary* at 1085 (defining "homosexual" as "one who is *inclined* toward or practices homosexuality" (emphasis added)). The Department of Justice itself argued for a definition of "propensity" as "inclination" before the Ninth Circuit, in the case that apparently serves as the Administration's model for its policy. *See* Gov't Br. at 23 n.8, *Meinhold* v. *United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994) (No. 93-55242) ("[P]ropensity" is "an 'often intense natural inclination.' " (citing *Webster's New Collegiate Dictionary* 943 (9th ed. 1990))).

The Solicitor General's twin responses to this common understanding of the term "propensity" are themselves testament to the indefensibility of the position he defends. First, he notes that the dictionary includes the word "propensity" in the synonymy for the word "leaning," and, therein, in distinguishing "propensity" from "leaning," suggests that the word "propensity" "may apply to an innate or deeply engrained longing or attraction making a certain course of action highly probable." *See* Gov't Supp. Br. at

4 (quoting *Webster's Dictionary* at 1286 (definition of "leaning")). This entry does not in any way suggest, contrary to the Solicitor General's belief, that "propensity" is synonymous with "likely"; it suggests only that "propensity" may refer to an innate longing or attraction, *which in turn* may render certain action more likely—and, at that, the entry only indicates that "propensity" *may* refer to such an innate longing or attraction, not that it need so refer or even that it ordinarily does in common usage. If anything, the significance of this entry is not that it suggests a possible distinction between "propensity" and "leaning," but that it includes "propensity" *as a synonym of "leaning,"* which it defines, as it does "propensity," as an "inclination." The interchangeability of "propensity," "inclination," and "leaning" all but confirms that "propensity" cannot be defined as "a likelihood," as the regulation purports to do.

Second, the Solicitor General combs from the United States Reports two examples of use of the word "propensity," which he claims support his equation of that term with "likely." *See* Gov't Supp. Br. at 4. Apart from the general irrelevancy of this enterprise, neither of the examples supports the regulatory definition he seeks to justify. The Court in *Michelson* v. *United States,* 335 U.S. 469, 475 (1948), clearly used the word "propensity" to mean "inclination" or "predisposition," not, as the Solicitor General seems to believe, "likely." And although Justice Blackmun (joined by Justice Stevens), in *Ballew* v. *Georgia,* 435 U.S. 223, 235 (1978), did use the words "propensity" and "likelihood" interchangeably in discussing the conviction rates for juries comprised of different numbers of jurors, he did not use either word to mean "likely," as the Department of Defense regulation and implementing interpretations use the phrase "a likelihood."

If resort to caselaw is to be had, even a cursory review reveals that the weight of even arguably relevant authority is that the word "propensity" means merely an "inclina-

tion," precisely the definition the dictionaries ascribe to the term. *See, e.g., Robinson v. Californjia,* 370 U.S. 660, 678-79 (1962) (Harlan, J., concurring) ("Since addiction alone cannot reasonably be thought to amount to more than a compelling *propensity* to use narcotics, the effect of this instruction was to authorize criminal punishment for a *bare desire* to commit a criminal act." (emphasis added)); *Powell* v. *Texas,* 392 U.S. 514, 543 (1968) (Black, J., concurring) ("Punishment for a *status* is particularly obnoxious, and in many instances can reasonably be called cruel and unusual, because it involves punishment for a *mere propensity,* a *desire* to commit an offense . . . ." (emphasis added)).

There is simply no credible argument that in common usage "propensity" means "likely"; any argument that it does is sophism. There certainly is no argument that the very Congress that refused to lift the long-time ban on homosexuals in the military and insisted that service members be discharged even for statements that they were homosexual would have regarded these terms as equivalent. For to define the term "propensity" as "likely" is "to create . . . a sanctuary in the military where homosexuals could serve discreetly and still be subject to separation for proscribed conduct," the very circumstances the Congress concluded would be "inimical to unit cohesion, morale, welfare and discipline, unenforceable in the field, and open to legal challenge." H.R. Rep. No. 200, 103d Cong., 1st Sess. 289 (1993), *reprinted in* 1993 U.S. Code Cong. & Admin. News 2013, 2076.

B.

When the regulation was announced, the Secretary attempted to justify it on the ground that the substitution of the statutory term "propensity" for the term "desire," which appeared in the pre-1993 DoD Directive,[10] funda-

[10] The statute now defines "homosexual" as "a person, regardless of sex, who engages in, attempts to engage in, has a *propensity*

mentally changed the policy from one requiring the discharge of all homosexuals to one requiring the discharge only of those homosexuals likely to engage in homosexual acts. *See* J.A. at 338-39 (Secretary Aspin news conference) ("[W]e've eliminated the word 'desire' to emphasize that the statement must be one that shows a likelihood to engage in acts."). The change of the word "desire" in the pre-1993 Directive to the statutory term "propensity" was regarded by Congress, however, as only a "minor drafting clarification" never intended to "affect the practical effect of the policy," S. Rep. No. 112 at 289-90, as the Deputy Attorney General herself observed at the time, *see id.* at 290.

Although noting that the change was not intended to have any "practical effect," the committee did, as well, refer to the drafting change as a "useful clarification." *Id.* Seizing upon this observation, the Solicitor General argues that the usefulness of the change was in its clarification that the focus of the new policy, like the prior policy, is on the likelihood of future homosexual acts, not merely on homosexuality. This argument is plausible, however, only if one accepts the Solicitor's mistaken premise that the prior policy was itself concerned only with homosexual acts; but if one appreciates that the prior policy was clearly status-based, as I believe the Solicitor must, *see* Gov't Supp. Br. at 6 (noting that committee viewed change as "useful," but omitting any reference to committee statements that change was not to have any practical effect), then it can hardly be maintained that a change which fundamentally altered the policy to one that was entirely

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to engage in, or intends to engage in homosexual acts, and includes the terms 'gay' and 'lesbian.'" 10 U.S.C. § 654(f)(1) (emphasis added). The pre-1993 Directive defined "homosexual" as "a person, regardless of sex, who engages in, *desires* to engage in, or intends to engage in homosexual acts." DoD Directive 1332.14 (March 9, 1982), *reprinted in* 32 C.F.R. Ch. 1, Pt. 41, App. A, ¶ H.1.b.(1) (1994) (emphasis added).

conduct-based was merely a "minor drafting clarification" never intended to "affect the practical effect of the policy."

Considering that the prior policy was unmistakably addressed to homosexuality *per se*, rather than the likelihood of conduct, and considering that the Administration had nonetheless argued, by equating "desire" with "a likelihood of future conduct,"[11] that the prior policy was addressed to conduct, it is, if anything, more believable that Congress thought the clarification "useful" as a reiteration that the policy required exclusion of all homosexuals, not only those who are likely to engage in homosexual conduct. That is, it may well be that Congress concluded that, because propensity connotes neither volition nor longing, this term would not be as susceptible to the Administration's transmogrifications as "desire" had proven to be.[12]

C.

The Solicitor General attempts to defend the regulation on the grounds both that it is a reasonable interpretation

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[11] *See, e.g.*, Gov't Br. at 10 (July 30, 1993), *Meinhold v. United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994) (No. 93-55242) ("The regulatory language, DoD's reasonable interpretation, and judicial precedent make plain that the [pre-1993] policy targets members who have engaged or . . . will likely engage in homosexual conduct. The policy targets homosexual 'conduct—past, present, and future, but conduct nonetheless.'" (citing *Watkins* v. *United States Army*, 847 F.2d 1329, 1362 (9th Cir. 1988) (Reinhardt, J., dissenting))); *cf. Steffan* v. *Perry*, 41 F.3d 677, 687 n.7 (D.C. Cir. 1994) (*en banc*) ("The Ninth Circuit [in *Meinhold*] construed the 'desires' language to mean something akin to intent.").

[12] *Compare Webster's Dictionary* at 612 (defining "desire" as "1 : conscious impulse toward an object or experience that promises enjoyment or satisfaction in its attainment . . . 2 a : an enduring and passionate longing or intense yearning : an urgently impelling motive toward attainment : CRAVING, APPETENCY . . . b(1) : a strong physical inclination (2) : erotic urge : sexual attraction or appetite . . . c : a striving after in intent : a deliberate choice or preference") *with id.* at 1817 (defining "propensity" as "a natural inclination : innate or inherent tendency").

of an ambiguous statute and that it was necessary to remedy the constitutional infirmity of the statute. Neither of these asserted justifications is sufficient to uphold the regulation.

The Solicitor General first asserts that even if "propensity" does not mean "a likelihood" of future conduct, the agency's definition is nonetheless entitled to deference as a reasonable interpretation by the agency charged with the statute's administration. This is not, however, an instance where deference to an agency's regulatory interpretation of a statute is appropriate: Because the statute unambiguously requires the discharge of all known homosexuals, a regulation that limits discharge to only those known homosexuals who are likely to engage in homosexuals acts is *per se* unreasonable. Nor, given that the President does not attempt to defend the regulatory modification on the ground it is needed in the interest of national security, is this a case where the Executive must be afforded deference, despite contrary congressional action, because of the President's preeminent role in matters of national security, *see* U.S. Const. Art. II, § 2; *cf. United States* v. *Curtiss-Wright Export Corp.,* 299 U.S 304, 319-20 (1936) This is, rather, the archetype of the case described by Justice Jackson, where "the President takes measures incompatible with the expressed or implied will of Congress, [and] his power is [therefore] at its lowest ebb, for . . . he can rely only upon his own constitutional powers minus any constitutional powers of Congress over the matter." *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579, 637 (1952) (Jackson, J., concurring); *see also Chappell* v. *Wallace,* 462 U.S. 296, 301 (1983) ("The Framers of the Constitution . . . explicit[ly] grant[ed] plenary authority to Congress 'To raise and support Armies'; 'To provide and maintain a Navy'; and 'To make Rules for the Government and Regulation of the land and naval Forces.' " (quoting U.S. Const. Art. I, § 8, cls. 12-14)); *Weiss* v. *United States,* 114 S. Ct. 752, 760-61 (1994) ("Judicial

deference . . . it at its apogee when reviewing congressional decisionmaking in [the military context]. . . . Congress has primary responsibility for the delicate task of balancing the [constitutional] rights of servicemen against the needs of the military." (internal quotations omitted)).

The Solicitor General also attempts to defend the regulation on the grounds that it was necessary to avoid a question of the statute's constitutionality,[13] and is, for that reason, permissible. However, an agency of unelected officials has no authority to alter the plain commands of the Congress simply because, in its view, questions exist as to the constitutional validity of a such a statute. *Cf. Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust,* 113 S. Ct. 2264, 2282-83 (1993) ("[I]n a case of statutory ambiguity, 'where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.' " (quoting *Edward J. DeBartolo Corp.* v. *Florida Gulf Coast Bldg. & Const. Trades Council,* 485 U.S. 568, 575 (1988))). This is especially true where, as here, Congress explicitly considered, at length, the constitutional validity of its action, and concluded that it was well within its constitutional authority. *See* Gov't Br. at 20 ("Congress specifically concluded that the new policy does 'not violate the constitutional rights of [homosexuals].' " (quoting S. Rep. No. 112 at 284)).

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[13] *See* Gov't Br. at 23-24 ("[T]o the extent that the military's reasonable construction of the term 'propensity' avoided a serious question regarding the constitutionality of this statutory provision, the district court was all the more required to defer to that construction." (citing *Concrete Pipe & Prods.* v. *Construction Laborers Pension Trust,* 113 S. Ct. 2264, 2282-83 (1993))); *see also id.* at 16 (arguing against strict scrutiny because "[t]he classification here is directed at homosexual 'acts and the likelihood of acts' ").

D.

The Administration vehemently argues, and Lt. Thomasson on occasion agrees, that the validity of the regulation is not before the court and should under no circumstance be addressed by the court. *See, e.g.*, Gov't Supp. Br. at 3.[14] These protestations are to be expected, but they are unavailing. Lt. Thomasson makes two separate arguments in challenging the military's policy, not one. The first, which the majority ably addresses, is that the policy, defined collectively by the statute and the regulation, is unconstitutional because it irrationally presumes prohibited conduct from a mere statement of status. The second, which the majority does not address, is that the military's policy is wholly status-based because the conduct-based regulation is invalid under the statute, and, without the regulation, the statute unconstitutionally authorizes the discharge of homosexuals solely on the basis of their status as homosexuals.

The Administration defends against Thomasson's argument that the policy is status-based entirely on the ground that the policy is conduct-based *by virtue of the regulatory*

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[14] Lt. Thomasson does, at times, purport not to challenge the regulation. *See, e.g.*, Appellant's Rule 28(f) Supp. Mem. at 12 (merely noting that an argument raised by *amicus curiae* is not necessarily before the court); *id.* at 2, 5. *But see* Appellant's Resp. to Mot. of *Amicus Curiae* Family Research Council for Leave to Participate in Oral Argument at 2 & n.1 (expressly representing that he challenges validity of regulation). He does so, however, for what I regard as the same transparent reasons that underlie the Solicitor General's entreaties that the regulation is not before us. Although Lt. Thomasson recognizes that he must challenge the regulation in order to challenge the statute's exclusion of homosexuals on grounds of status, he nevertheless prefers, should the statute be upheld, that the regulation remain intact because of the sanctuary it creates. Under these circumstances, to acquiesce in the collaborative argument by the parties that we should not address the validity of the regulation would, in my judgment, be to allow ourselves, as judges, to be used as pawns in a political game between players with only putatively different interests.

definition of the statutory term "propensity." [15] Lt. Thomasson responds that, to the extent this is so, the regulation is but "lawyerly afterthought" and "definitional trickery." Appellant's Br. at 26; Appellant's Reply Br. at 19. This is necessarily to draw into question the validity of the regulation.[16] Otherwise, Lt. Thomasson's argument that the policy is entirely status-based is patently specious,

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[15] *See, e.g.*, Gov't Br. at 11 ("The legislative classification in 10 U.S.C. 654(b)(2)—barring service by members who state that they are homosexuals and who fail to demonstrate that they do not and are not likely to engage in homosexual acts—does not violate equal protection."); *id.* ("[T]he Government has a legitimate interest in prohibiting homosexual acts in the military. To avoid the risk to miltary effectiveness posed by such acts, Congress enacted a classification that reasonably presumes—subject to rebuttal by the service member—that a member who states that he is a homosexual is likely to act consistently with his sexuality and engage in prohibited homosexual acts."); *id.* at 12 ("Thomasson's claim that the statute violates the First Amendment also lacks merit. . . . The new policy treats a service member's statement of homosexuality as a basis from which to presume, in the absence of rebuttal by the member, that he engages in, or is likely to engage in, homosexual acts. The First Amendment does not prohibit such evidentiary use of a member's statements."); *id.* at 13 ("Thomasson argues (Br. at 34) that heightened scrutiny should apply because the policy is directed, he contends, at 'sexual orientation.' As we show *infra*, pp. 22-24, however, this argument fundamentally misapprehends the relevant classification, which the district court correctly held is directed at homosexual 'acts and the likelihood of acts.'"); *id.* at 22 ("The Directives equally make clear that the new policy is conduct-directed and does not target orientation."); *id.* at 23 ("Thomasson's repeated assertion, (*e.g.*, Br. 24, 33-37) that the policy classifies on the basis of homosexual orientation cannot be reconciled with the plain *regulatory* language that equates 'propensity' with 'likelihood.'" (emphasis added)).

[16] *Reno* v. *Koray*, 115 S. Ct. 2021, 2024 n.2 (1995), urged upon us by both the government and Lt. Thomasson as authority against our consideration of the validity of the regulation, does not in any way suggest that we should abstain from consideration of this question. In that case, unlike in that *sub judice*, the plaintiff had abandoned his constitutional argument altogether.

because, as the Administration notes, it is contradicted by "the plain regulatory language." Gov't Br. at 23.

IV.

Because I would invalidate the regulation, I must address whether the statute's mandatory exclusion of known homosexuals is constitutionally permissible. Under rational basis review, this exclusion must be sustained if both of the distinctions implicit in the statute—that between homosexuals and heterosexuals and that between known and undetected homosexuals—are rationally related to a legitimate governmental interest. *Heller* v. *Doe*, 113 S. Ct. 2637, 2642 (1993).

Although not required under rational basis review, *see id.* at 2643 ("[The Government] has no obligation to produce evidence to sustain the rationality" of the Act; "a legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."), Congress made legislative findings more than sufficient to demonstrate that the exclusion of known homosexuals from military service both serves a legitimate governmental interest and is rationally related to that interest.

Congress concluded, in findings that are fully supported in the legislative record, *see, e.g.*, S. Rep. No. 112 at 274-75 (recounting General Schwarzkopf's testimony that unit cohesion "is the single most important factor in a unit's ability to succeed on the battlefield"), that "[s]uccess in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion," 10 U.S.C. § 654(a)(6), and that "unit cohesion," defined as "the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members," was "[o]ne of the most critical elements in combat capability," *id.* at § 654(a)(7).

It cannot be gainsaid that the development and preservation of unit cohesiveness essential to combat capability is a legitimate—indeed, compelling—governmental interest.

Nor can it be successfully maintained that the exclusion of known homosexuals because of the effect that their manifested sexual attraction for members of the same sex has on unit cohesion does not satisfy the minimal requirement that the exclusion rationally further the government's legitimate interest in preserving unit cohesiveness.[17] In assessing the rationality of the relationship between Congress' objective and its means, "significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it," *See Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 28 (1976), and the burden is on he who challenges the governmental action "to negative every conceivable basis which might support it," *Heller*, 113 S. Ct. at 2643.

Here, the Congress of the United States expressly found that "[t]he presence in the armed forces [of homosexuals, as statutorily defined] would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability." 10 U.S.C. § 654(a)(15); *see also* S. Rep. No. 112 at 289 ("The July 19 Memorandum carries forward longstanding Department of Defense policy[;] . . . [it] makes it clear that the mandatory discharge policy is necessary because such matters interfere 'with the factors critical to combat effectiveness, including unit morale, unit cohesion, and individual privacy.' "). This finding is in turn supported by, *inter alia*, the unequivocal testimony of our military leaders, testimony which bears repeating. As General Powell testified,

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[17] Obviously it is this propensity, this attraction for members of the same sex, that, at once, renders permissible the military's exclusion of homosexuals in order to preserve unit cohesion and also distinguishes the ban on homosexuals from what would be an emphatically impermissible policy of excluding service members based upon, for example, race.

> the presence of open homosexuality would have an unacceptable detrimental and disruptive impact on the cohesion, morale, and esprit of the armed forces. . . .
>
> . . . [O]pen homosexuality in units is not just the acceptance of benign characteristics such as color or gender or background. It involves matters of privacy and human sexuality that, in our judgment, if allowed to exist openly in the military, would affect the cohesion and well-being of the force. It asks us to deal with fundamental issues that the society at large has not yet been able to deal with.

Id. at 278, 281. And as General Schwarzkopf, who shared General Powell's belief, testified:

> [I]n my years of military service, I have experienced the fact that the introduction of an *open homosexual* into a small unit immediately polarizes that unit and destroys the very bonding that is so important for the unit's survival in time of war . . . .

Id. at 280 (emphasis added); *see also* S. Hrg. 103-845 at 780 (testimony of Gen. Otjen) ("[W]hen somebody identifies themselves as a homosexual . . . that is disruptive to unit cohesion."); Appellant's Br. at 26 n.25 ("The so-called 'privacy' and 'sexual tension' rationales—which are variations on the 'unit cohesion' theme, . . . if valid at all, arise from the mere presence of homosexuals [in the military].").

Given Congress' conclusion that the mere presence of known homosexuals in the military undermines unit cohesiveness, the statutory ban on service by such persons is not just rationally related to the end of unit cohesiveness, it is narrowly tailored to achievement of that end. In fact, it is more narrowly-tailored to that end than was the policy embodied in the pre-1993 Directives, which, by allowing questioning of recruits about their sexual orientation and

investigations into the homosexual propensities of service members, sought to ferret out even unknown homosexuals in order to discharge them from military service. The policy therfefore would pass constitutional muster even under heightened or strict scrutiny; it certainly passes under the rational basis review applicable to the classifications at issue in this case,[18] as courts repeatedly held under the previous Directive, *see, e.g., Steffan* v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994) (*en banc*); *Ben-Shalom* v. *Marsh*, 881 F.2d 454 (7th Cir. 1989), *cert. denied*, 494 U.S. 1004 (1990); *cf. Woodward* v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989) (upholding military's pre-1982 exclusion of homosexuals), *cert. denied*, 494 U.S. 1003 (1990); *Rich* v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1984) (upholding pre-1982 exclusion even were heightened scrutiny applicable); *but see Meinhold* v. *United States Department of Defense*, 34 F.3d 1469 (9th Cir. 1994) (interpreting the prior policy as "conduct-based" because the ban on status raises constitutional problems), and as the Solicitor General candidly acknowledged before this court.[19]

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[18] *Jacobson* v. *United States*, 503 U.S. 540, 551-52 (1992), and *Robinson* v. *California*, 370 U.S. 660, 667 (1962), which held unconstitutional the criminal punishment of individuals based upon a presumption of action from mere status or predisposition, do not dictate otherwise. Discharge from military service is not "punishment," as the District of Columbia Circuit observed in *Steffan*, 41 F.3d at 687. *See also* Gov't Br. at 30 ("*Jacobson* was a criminal prosecution, which involves restrictions not applicable to military personnel decisions."). In any event, the statute as written does not presume likely conduct from status, but merely homosexual propensity (that is, inclination or attraction) from a statement or other manifestation of homosexuality.

[19] THE COURT: *Does the United States believe that if this regulation permits the discharge of someone who is homosexual, irrespective of conduct, then the regulation is invalid?*

COUNSEL: *No.*

THE COURT: *So in other words . . . [t]he military and Congress can provide for the discharge of any individual who is homosexual*

V.

Because the Administration's policy regarding homosexuals in the military, implemented through regulation, is fundamentally different than the statute enacted by the Congress and signed into law, I would invalidate that policy as contrary to statutory mandate. I would, however, uphold the policy against military service by known homosexuals that was actually enacted into law by the Congress of the United States, as a permissible exercise of the Legislature's plenary authority to prescribe regulations for the military.

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in the view of the Department of Justice; is that correct, Mr. Kneedler?

COUNSEL: Well, this case does not present that.

THE COURT: I understand that.

. . .

COUNSEL: And that yes, in the sense that the—that the military is entitled to make a judgment that an expression . . . that one is homosexual has a correlation at least, as the D.C. Circuit said in *Steffan*, a correlation that that—

THE COURT: My question is: Suppose there's no correlation. Irrespective of conduct, may the military discharge homosexuals in the view of the Department of Justice constitutionally?

COUNSEL: That would present—That would present a more difficult question. We acknowledge that—

THE COURT: Does the United States have a position on that? Because in my view that's what Congress intends. And the question is whether the executive branch has attempted to circumvent that through the regulations. So I may have to face that question, and I need the Department's view on that.

. . .

THE COURT: Does the United States have a position on the question I asked; or does it not? It may not. I'm just asking.

COUNSEL: *We believe that such a policy would be constitutional. But we acknowledge that because of the overriding needs of the military, we believe that such a policy would be constitutional.*

Transcript of Oral Argument, Sept. 12, 1995, at 44-47 (emphasis added).

Judges Russell, Widener, Wilkins, Hamilton and Williams join in this opinion.

HALL, Circuit Judge, dissenting:

Before I explain why I would reverse the judgment of the district court, I must comment on the extended discussion of the military context of this case in the majority opinion.

I recognize that our duty in weighing the constitutionality of a statute is " 'grave[ ] and most delicate,' " and I do not propose to " 'lightly second-guess' " any decision of Congress or of the President.[1] Though the delicacy of the situation stems from the respect we owe the legislature and executive, the gravity inheres in our duty to defend the Constitution against the trespasses of those branches, no matter how carefully or pedantically they be constructed, and notwithstanding their popularity. The Founders gave us lifetime tenure to assure that we would not shrink from that duty.[2]

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[1] *See supra* at 10 (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927) (opinion of Holmes, J.), and *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 251 (1990)).

[2] As Alexander Hamilton argued at the time:

> Considerate men of every description ought to prize whatever will tend to beget or fortify that temper [independence] in the courts; as no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be a gainer today.
>
> . . .
>
> That inflexible and uniform adherence to the rights of the Constitution, and of individuals, which we perceive to be indispensable in the courts of justice, can certainly not be expected from judges who hold their offices by a temporary commission.

Federalist No. 78 (Hamilton), at 470-471 (Rossiter ed. 1961).

Likewise, though raising the armies and commanding them are the exclusive tasks of the Congress and President, we have a role—a vital one—in ensuring that the military remains submissive to the Constitution and civil authority. We have now had a large standing army for half a century, and the Republic has endured. In the annals of history, our experience must be counted as the exception rather than the rule, and I am convinced that the presence of a strong and independent judiciary, upon which the people may rely to guard individual rights, deserves much of the credit for this good fortune. Freedom is not inherited; it is earned through eternal vigilance. The military is a sentinel in its way, and we in ours.

With that said, I must and do concede that the military is a unique society within a society. The discipline and self-sacrifice that characterize military service have little in common with the liberty and self-interest of civilian life, and rules of constitutional law designed for the latter must sometimes be tailored to the special needs of the military.[3] Those rules nonetheless apply; they *must* apply.

> Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart. For almost two centuries, our country has taken singular pride in the democratic ideals enshrined in its Constitution . . . . It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties . . . which makes the defense of the Nation worthwhile.

United States v. Robel, 389 U.S. 258, 265 (1967). Aside from cheapening our national values, a broad "military exception" from the Constitution in the interest of defending us from foreign danger could transform the mili-

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[3] *E.g., Brown v. Glines*, 444 U.S. 348, 354 (1980) (permitting restrictions on speech likely to interfere with vital prerequisites to military effectiveness).

tary into a domestic danger. Love of one's own liberty is inborn; love of another's must be learned. Permitting disrespect of constitutional rights to flourish within the military would inevitably cause disrespect of them without it. Consequently, while I will defer, as I ought and must, to the professional judgment of military commanders on things military, I may never defer to their judgment on things constitutional.

I.

It is critical in this case to resist falling into discussion of generalities, as if each homosexual were a clone of some preening archetype. This case is about Lieutenant Paul Thomasson, and only him. The behavior of others is beside the point. Even without the challenged policy, some homosexuals would be unfit for military service, and some among them whose sexual misconduct were the root of their unfitness. The same, of course, can be said for heterosexuals. One need only to read the newspaper to know that the libidos of heterosexual American servicemen are not always restrained by military codes of conduct. But most are.

So, why was Lt. Paul Thomasson discharged?

It was not because of "conduct" in any ordinary sense of the word. To say his service record is "spotless" risks understatement; "sparkling" is a better choice. In his decade in the Navy, Lt. Thomasson rose through the ranks from ensign to full lieutenant. He has excelled in every task assigned him. In April 1991, he was chosen over numerous peers to be an intern to the Joint Chiefs of Staff at the Pentagon. He spent a year there, preparing briefings for Joint Chiefs Chairman Gen. Colin Powell and Secretary of Defense Richard Cheney, and he accompanied them to Congressional hearings on the military budget and force reductions. He was awarded the Joint Service Commendation Medal for "superlative performance" of that role, and, at the end of his internship, Gen. Powell thanked him in a personal letter for "contribut[ing]

immeasurably" to the Joint Chiefs' success. Thomasson closed his career in the service of Rear Admiral Albert Konetzni, who, ironically, was in charge of implementing the policy on homosexuality at issue here; nevertheless, Admiral Konetzni recommended him for immediate promotion to Lieutenant Commander on the very day of his discharge.[4]

The performance coin has no other side: the Navy does not complain that Thomasson ever rendered middling, let alone deficient, service. Moreover, the Navy has no proof that Thomasson has engaged in sodomy or broken any other conduct rule, high or petty. Conduct cannot be the cause of his discharge.

Likewise, the discharge cannot be explained by Thomasson's homosexual status per se. Under the policy,[5] homosexuals are expressly permitted to serve.

It is only because he has said that he is homosexual.

There is no difference between being and saying *except* that saying produces a reaction in others. The issue, then, is whether saying, and producing a reaction, is a ground

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[4] The high esteem reflected by this recommendation was nothing new. In 1990, Commander T. M. Feeks noted that Thomasson "routinely out-performs many lieutenant commanders." In 1992, Air Force Brigadier General C. V. Jones of the Joint Chiefs of Staff, who had directly supervised Thomasson during his internship, reported that "he is ready *now* for promotion to Lieutenant Commander." Rear Admiral Alexander Krekich, who shared supervisory responsibilities with Gen. Jones, concurred in this recommendation. Adm. Krekich described Thomasson as "a super star—one of the Navy's future leaders" and as "the top intern among a group of superlative junior officers." He concluded, "I would *personally* seek out to serve with me again! Outstanding 'Flag lieutenant' & *3* or *4* star material. Groom early." I could go on and on, inasmuch as the effusive tone of this praise pervades Thomasson's entire service record.

[5] The policy explicitly states that "homosexual orientation is not a bar" to "service entry or continued service." Department of Defense Directive 1332.30 at 2-1 para. C (March 4, 1994).

for discharge that may constitutionally be applied to Lt. Thomasson. I believe that it is not.

II.

A classification violates equal protection if effecting an impermissible purpose was *a* (not *the*) motivating factor for the classification, because

> [r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 265 (1977).

Private prejudice is a private matter; we are free to hate. But the same concept of liberty for all that protects our prejudices precludes their embodiment in law. "The Constitution cannot control such prejudices but neither can it tolerate them. Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." *Palmore v. Sidoti*, 466 U.S. 429, 433 (1984). This rule applies even though the group targeted by the prejudice is not a "suspect" or "quasi-suspect" class for equal protection analysis. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448 (1985).[6] Consequently, the desire to disadvantage a politically unpopular group is never a legitimate governmental interest. *Id.* at 447; *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

There is a great deal of evidence that the statute was motivated by a desire to accommodate prejudice against homosexuals. In announcing the policy, the President stated that "those who oppose lifting the ban are clearly focused not on the conduct of individual gay service

[6] It is not necessary, therefore, to decide here whether homosexuals are a suspect or quasi-suspect class.

members, but on how nongay service members feel about gays in general and, in particular, those in the military service." Assistant Secretary of Defense Edwin Dorn testified that "much of the resistance to gays is grounded in fear and prejudice." Retired Admiral Thomas Moorer, former Chairman of the Joint Chiefs of Staff, served on an advisory committee during development of the new policy. He was quite blunt about his views: homosexuals engage in "a filthy, disease-ridden practice," are "inherently promiscuous," and have no place in the military. He stated that many other "military people" share his views. Finally, Lt. General John Otjen, who chaired the Military Working Group, stated that "there's a collective sense in the military . . . that homosexuality is wrong." Gen. Otjen believed that all members of the Military Working Group shared this "collective sense." Moreover, he conceded that, but for fear of and prejudice against homosexuals, the policy would be unnecessary.

The evidence that prejudice against homosexuals is a purpose of "don't ask, don't tell" is therefore quite strong.

III.

A.

We are told, though, that tolerating this intolerance is essential to "unit cohesion." Even if accommodating the supposedly widespread disdain for gays were a permissible governmental purpose—and it is not—there is no evidence that the discharge of Lt. Thomasson will rationally further that purpose. Indeed, there is only speculation that the discharge of any homosexual would do so.

Dr. Lawrence J. Korb, Assistant Secretary of Defense under President Reagan, offered this critique of the "unit cohesion" rationale:

> There are at least three . . . major problems with the "unit cohesion" argument. First, it represents a severe and somewhat defeatist underestimation of the

> ability of today's servicemembers to keep their focus on professional military concerns; it also represents a uniquely curious (and, I believe, incorrect) admission that our soldiers and sailors could not effectively follow orders and do their jobs if we lifted the ban. Second, kowtowing to the prejudices of some by excluding others has never been an acceptable policy rationale, either in the military or in our society at large. And third, in the several units where acknowledged homosexuals are serving today (usually, by court order), there are no signs of unit disintegration or bad morale.

General Otjen, while a strong supporter of the "unit cohesion" hypothesis, admitted that it was based on the personal views of members of the Military Working Group rather than hard facts. The lack of real evidence is not for lack of investigating. In 1992, the General Accounting Office investigated similar organizations that permit open homosexuality in their ranks, and, the next year, the Secretary of Defense commissioned a study of analogous organizations and foreign militaries by the Defense Research Institute of the RAND Corporation. Both studies reported no serious problems resulting from the presence of open homosexuals. *See Able v. United States,* 880 F. Supp. 968, 978 (E.D.N.Y. 1995).

In any event, we have in the record before us a real homosexual, a real unit, and hence a real test of the "unit cohesion" hypothesis. Lieutenant Thomasson served for over fifteen months after admitting his homosexuality. His stellar job performance continued. There were in fact persons in his unit who disapproved of homosexuality, but they continued to do their duty and had no difficulty working with Lt. Thomasson. In fact, some were forced to question their preconceptions in light of Lt. Thomasson's example.[7] Not a single sailor testified that he had suffered even mildly diminished morale.

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[7] The views of Yeoman Third Class John J. Broughton are typical:

B.

The actual experience in Thomasson's unit should not surprise us. The ability of the American soldier to put duty before prejudice has been tested before.

"Unit cohesion" is a facile way for the ins to put a patina of rationality on their efforts to exclude the outs. The concept has therefore been a favorite of those who, through the years, have resisted the irresistible erosion of white male domination of the armed forces. Though the prejudice underlying such resistance have doubtless outlived the erosion, they have not manifested themselves in a loss of "unit cohesion."

Race is the obvious example. "Don't ask, don't tell" was formulated when the chairman of the joint chiefs of staff was a black man, a black man whose presence in the otherwise all-white inner circle of our military caused no apparent friction or decay in its morale, performance, or cohesion. Likewise, I am enough of a realist to know that there are racists serving in our armed forces, racists to whom Gen. Powell's high rank must have been distasteful. They did their duty anyway. Lest the irony escape anyone, consider the opinion of a committee, much like the Military Working Group behind "don't ask, don't tell," that studied the proposed racial integration of the Navy in the 1940s:

> Enlistment for general service implies that the individual may be sent anywhere,—to any ship or station

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At first [after Thomasson's disclosure], I was shocked and did not know whether or not to back out [of a volunteer assignment to work with Thomasson] and work in my old office. I did not know whether I could work with a homosexual. I decided to stick with the decision I made prior to knowing of LT Thomasson's disclosure. I am glad I did. The knowledge I have gained . . . from LT Thomasson is invaluable. . . . He was always professional towards me. LT Thomasson[,] in my opinion, is the best "LT" in the Navy. . . . His sexual orientation had no adverse effect on myself or to the Navy. With so few good naval officers, the Navy should definitely keep LT PAUL THOMASSON.

> where he is needed. Men on board ship live in particularly close association; in their messes, one man sits beside another; their hammocks or bunks are close together; in their common tasks they work side by side; and in particular tasks such as those of a gun's crew, they form a closely knit, highly coordinated team. How many white men would choose, of their own accord, that their closest associates in sleeping quarters, at mess, and in a gun's crew should be of another race? How many would accept such conditions, if required to do so, without resentment and just as a matter of course? The General Board believes that the answer is "Few, if any," and further believes that if the issue were forced, there would be a lowering of contentment, teamwork and discipline in the service.

Experience is the dread enemy of prejudice, and experience has routed the views of the General Board.

C.

Another incongruity of the "unit cohesion" hypothesis behind "don't tell" is that it encourages lying in the interest of building and maintaining "bonds of trust" among the troops. A relationship built on deception is anything but a "bond of trust." As the court observed in *Able*, 880 F. Supp. at 979,

> [T]he court deems extraordinary . . . the almost total lack of concern evidenced in the Congressional hearings and the Committee reports as to the impact on unit cohesion of the attempt to enforce secrecy on homosexuals and to enlist them in the perpetration of a hoax on heterosexuals. Common sense suggests that a policy of secrecy, indeed what might be called a policy of deception or dishonesty, will call unit cohesion into question.

* * *

> . . . [H]eterosexuals and homosexuals alike would be entitled to think it demeaning and unworthy of a great nation to base a policy on pretense rather than truth.

The sad corollary of this "policy of pretense" is that moral courage like that displayed by Lt. Thomasson is punished.

IV.

The policy also operates in an unconstitutional manner. Its bedrock is a presumption that *everyone* will fail to comply with rules of conduct—a declared homosexual is bound to misbehave, and the members of his unit will doubtless allow private prejudice to override discipline. A presumption of misconduct from a person's status, or even from his private prejudices, does not comport with due process.

An analogy offered by Lt. Thomasson at oral argument makes the point well. The Supreme Court has upheld the constitutionality of the military's uniform regulations, notwithstanding that they bar the wearing of yarmulkes. *Goldman v. Weinberger*, 475 U.S. 503 (1986). Now suppose a serviceman writes a letter to his superior stating, "I am an Orthodox Jew." Has he broken the uniform regulations? Of course not. Should he be disciplined or discharged on account of his presumed "propensity" to wear a yarmulke? Of course not. Should he be discharged because his status and accompanying presumed propensity are presumed to stir up anti-Semitism among the majority gentiles? Of course not. In America, we presume that individuals obey the rules until they prove otherwise. If persons do not obey rules with which they disagree, or are presumed to act upon every urge or desire whatever the legal consequences, then rules are a vain exercise indeed.

> [M]ost people obey the law even when they disapprove of it. This obedience may reflect a general-

> ized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence.

Jacobson v. United States, 503 U.S. 540, 551 (1992). *See also Powell v. Texas*, 392 U.S. 514, 543 (1968) (Black, J., concurring) ("Punishment for a status is particularly obnoxious . . . ; the mental element is not simply part of the crime but may constitute all of it.") *Cf. Robel*, 389 U.S. at 423-428 (member of Communist Party could not be presumed to have the specific intent to further its unlawful goals).

V.

The intolerability of a presumption of misconduct from a status renders irrelevant the majority's unremarkable holding that the First Amendment does not bar the evidentiary use of an "admission." Of course it does not. But Thomasson did not "admit" anything that could justify his discharge. He said, "I am gay." Let us take that as admitted. "A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service . . . unless manifested by homosexual conduct . . . ."[8] Thomasson has not "admitted" any homosexual conduct.

The rejoinder, of course, is that the statute and policy *define* speech as "conduct." This definition fails to withstand constitutional scrutiny, for two reasons. First, as I have already discussed, it impermissibly presumes that homosexuals are unable to obey rules of conduct. Second, it creates a classification *among homosexuals* based *solely* on speech. Because there is no reason even to "rationally speculate"[9] that declared homosexuals are more likely to

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[8] Directive 1332.30, para. C.

[9] *See Heller v. Doe*, 113 S. Ct. 2637, 2642 (1993) (stating constitutional minimum for legislative findings underlying a classification).

break the rules than undeclared—the opposite speculation seems far more accurate—this rule must be targeted at suppressing the speech itself.[10] Here we meet up with the First Amendment, but on much different ground than the majority tackles it. Suppressing speech is "grave[ ] and most delicate" stuff. The military has a broader power to control speech than a civilian government, *Brown v. Glines*, 444 U.S. 348 (1980), but even there the power is exceedingly narrow: speech may be suppressed only if it is likely to interfere with vital prerequisites to military effectiveness. *Id.* at 354. The "vital prerequisite" here is, I suppose, the accommodation of the prejudice of heterosexual servicemen. I very much doubt that such accommodation—never a legitimate legislative end—can ever be a "vital prerequisite" to the military's mission. In any event, Lt. Thomasson has proved beyond any doubt that *his* speech had no deleterious impact at all, let alone to some "vital prerequisite" to military effectiveness. If anything, the expulsion of a fine officer in retaliation for his speech will ultimately prove worse for the Navy.

VI.

Lt. Paul Thomasson has been declared unfit to defend our country based on nothing more than an expression of his state of mind. The expression was not illegal, and the fact admitted is not a ground for discharge. His record of service is superb, and the Navy presented absolutely no evidence that he has violated any military rule of conduct in any way at any time, and absolutely no evidence that his exemplary record is not indicative of his likely future behavior.

Lt. Paul Thomasson's career is over because it is presumed that he will misbehave in a manner that is assumed to incite the prejudices of his colleagues, whom it is speculated will abandon their duties to defend the

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[10] Hence, the popular label for this prong of the policy—"don't tell"—is quite accurate.

United States rather than tolerate him in their midst. There is no proof of any of these hypotheses in the record, and there is abundant disproof. In the final analysis, the *expression* of Lt. Thomasson's *thoughts*, without more, is the cause of his "honorable" banishment from the Navy. "I think we must let his mind alone." [11]

I dissent.

Judge Erwin, Judge Michael and Judge Motz join in this dissent.

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[11] *American Communications Ass'n v. Douds*, 339 U.S. 382, 444 (1950) (Jackson, J., concurring and dissenting).

[DEPT. SEAL]

DEPARTMENT OF THE NAVY
BUREAU OF NAVAL PERSONNEL
Washington, D.C. 20370-5000

In Reply Refer to
1920
Ser 822/148
24 Jan. 1995

From: Chief of Naval Personnel

To: Secretary of the Navy

Subj: LTJG RICHARD D. SELLAND, SC, USN, 216-90-1218/3100

Ref: (a) CONSUBRON SIX ltr 1611 Ser 10/092 of 26 Jan 93

(b) BOO Report 1020 Ser 822/0624 of 9 Mar 93

(c) CHNAVPERS ltr 1920 Ser 822/0702 of 12 Mar 93

(d) CHNAVPERS ltr 1920 Ser 822/1352

(e) Department of Justice, Office of the Associate Attorney General ltr of 9 Aug 93

(f) ASN (MR&A) Memo of 11 Mar 94

(g) CHNAVPERS ltr 1920 Ser 822/761 of 28 Mar 94

(h) DOD DIRECTIVE 1332.30

(i) CNO WASHINGTON DC 010300Z Mar 94 (NAVADMIN 033/94)

(j) COMNAVBASE, Norfolk ltr 1920 N73 of 22 Nov 94

(k) BOR Report 1920 Ser 822/3267 of 19 Dec 94

Encl: (1) Mr. Henry E. Hockeimer's ltr of 31 Oct 94

(2) Honorable discharge certificate

1. *Synopsis.* LTJG Selland is a regular Supply Corps Officer with four years commissioned service. He is presently assigned to the Fleet Industrial Supply Center, Norfolk. He has been recommended for separation from the Naval Service with an Honorable discharge by the Boards of Inquiry and Review which considered his case.

2. *Discussion*

a. Reference (a) reported LTJG Selland's admission of homosexuality to his Commanding Officer. Reference (b) reported that a Board of Officers considered LTJG Selland's admission of homosexuality and recommended him for separation from the Naval Service with an Honorable discharge. Reference (c) notified LTJG Selland of the initiation of administrative separation processing. By reference (d), the Secretary of the Navy approved LTJG Selland's separation from the Naval Service with an Honorable discharge. However, as directed by reference (e), the Attorney General of the United States suspended LTJG Selland's discharge pending the implementation of the new DOD homosexual conduct policy. Reference (f) authorized the reconsideration of LTJG Selland's case proceedings. Accordingly, reference (g) notified LTJG Selland of the re-initiation of administrative show cause proceedings per references (h) and (i), based on his admission of homosexuality. Reference (j) reported a Board of Inquiry (BOI) considered LTJG Selland's case. The BOI found LTJG Selland did not successfully rebut the presumption created by his admission of homosexuality, that he engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The BOI additionally recommended that LTJG Selland be

separated from the Naval Service with an Honorable discharge.

b. By enclosure (1), LTJG Selland's civilian counsel submitted a rebuttal statement. He raises four objections to LTJG Selland's BOI proceedings.

(1) LTJG Selland's previous military performance warrants his retention in the Naval Service.

(2) LTJG Selland successfully rebutted the presumption that he does not have the propensity to engage in homosexual conduct.

(3) LTJG Selland's statement of homosexuality is not grounds for separation under the DOD homosexual conduct policy.

(4) The Board's decision should be rejected because one of the BOI members made a statement concerning homosexuals in the military which tainted the proceedings.

c. In response to the cousel's objections:

(1) Per reference (h), LTJG Selland's statement of homosexuality, not his previous military performance, is the basis for determining his retention in the Naval Service.

(2) Per reference (j), the BOI found LTJG Selland did not successfully rebut the presumption that he has propensity to engage in homosexual conduct.

(3) Per reference (h), a statement of homosexuality, unless successfully rebutted, is justification for administrative separation.

(4) The statement made by a member of the BOI, concerning his personal beliefs on homosexuals in the military, did not taint the board proceedings as the member adhered to the direction provided in reference (h), concerning the administrative separation proceedings of serv-

icemembers who make statements of homosexuality. As shown by the follow-on questioning of the member at pp. 16-23 of the record of proceedings, he demonstrated an intent to put aside his personal opinions and adhere to directives. The challenge for cause to this member's participation properly was denied.

d. Reference (k) reported the Board of Review upheld the BOI's recommendation.

e. I have considered the entire record of this case and concluded LTJG Selland received all the procedural rights to which he is entitled and that his discharge for homosexual conduct is supported in fact and law.

3. *Recommendation.* Approve the recommendations of the Boards of Inquiry and Review to separate LTJG Selland from the Naval Service with an Honorable discharge. LTJG Selland attended North Carolina State University under an NROTC scholarship. LTJG Selland has met his minimum service obligation; accordingly there is no recoupment at issue in this case. Your approval of this letter and signature upon enclosure (2) will effect the recommended action. The separation code will be GRB (homosexual admission).

/s/ H. C. McKinney
H. C. McKinney
Rear Admiral, U.S. Navy
Deputy Chief of Naval Personnel

Approved Mar. 13, 1995

/s/ Bernard [Illegible]
Assistant Secretary of the Navy
(Manpower and Reserve Affairs)

APPENDIX E

[DEPT. SEAL]

DEPARTMENT OF THE NAVY
Commander
Naval Base Norfolk
1530 Gilbert ST. STE 200
Norfolk, VA 23511-2797

In Reply Refer to
1920
N73
22 Nov. 1994

From: Commander, Naval Base, Norfolk

To: Chief of Naval Personnel (Pers-82)

Subj: BOARD OF INQUIRY IN THE CASE OF LTJG RICHARD D. SELLAND, SC, USN, 216-90-1218/3100

Ref: (a) CHNAVPERS ltr 1920 Ser 822/762 of 28 Mar 94

(b) SECNAVINST 1920.6A

(c) PHONCON COMNABASE Norfolk (N73) LT Beattie/PERS-82 LT Matias of 18 Nov 94

(d) PHONCON COMNABASE Norfolk (N73) LT Beattie/OJAG (CODE 34) LCDR Shaffer of 18 Nov 94

(e) PHONCON COMNAVBASE Norfolk (N73) LT Beattie/PERS-82 LT Matias of 7 Nov 94

Encl: (1) Report of Proceedings

(2) Report of Board of Inquiry

(3) LTJG Selland's Rebuttal to the Board's Findings

1. Pursuant to references (a) and (b), a Board of Inquiry was convened in the case of LTJG Richard D. Selland, SC, USN on 12 and 13 July 1994.

2. We were unable to meet the 60 day timeline imposed by reference (a). The events leading to this result are as follows:

a. Reference (a), received on 5 April 94, was forwarded to LTJG Selland on 7 April 94. LTJG Selland consumed approximately 2 weeks finding and conferring with counsel;

b. The Board was originally scheduled for 9 May 94, however, LTJG Selland's civilian attorney delayed the Board until 13 June 94, and then 12 July 94, to accommodate the conflicting schedules of parties, attorneys, and witnesses;

c. The Board was held on 12-13 July 94, however, the verbatim transcript was not finished until 29 August 94;

d. A copy of the record of proceedings was forwarded to LTJG Selland on 30 August 94 for comment/rebuttal, with a response date of 30 September 94; and,

e. LTJG Selland's request to have until 31 Oct 94, to respond to the Board's findings was granted.

3. As confirmed by references (c), (d) and (e), your office was continuously apprised of these matters and the resultant impact on meeting the 60 day processing goal. This did not comply with the requirement to formally request an extension, however, direct liaison with the PERS-82 designated POC was continuous.

4. After an examination of all the evidence the Board found that LTJG Selland's statements were homosexual conduct within the meaning of paragraph 3 of Chief of Naval Operations message 010300Z Mar 94 (NAVADMIN 033/94). Likewise, the Board concluded that the

presumption of homosexual conduct raised by LTJG Selland's statements was not rebutted and, therefore, he failed to show cause for retention.

5. The Board determined that the findings warranted separation and recommended that LTJG Selland be separated with an Honorable Discharge.

6. Enclosure (1), a transcript of the proceedings, has been prepared in accordance with reference (b). Enclosure (2) is the report of the Board in this case. The record has been reviewed and is now forwarded for appropriate action, concurring in the Board's recommendation.

7. Enclosure (3) is LTJG Selland's rebuttal to the Board's findings. Pursuant to reference (e), enclosure (3) is also forwarded for action.

/s/ Paul D. Moses
PAUL D. MOSES

Copy to:

COMNAVBASE Norfolk (LT Beattie)
Fifth Coast Guard District (LCDR Good)
FISC Norfolk (00, LTJG Selland)

REPORT OF BOARD OF INQUIRY

A. Report of Board of Inquiry held on 12-13 July 1994, in the case of Lieutenant Junior Grade Richard D. Selland, SC, USN, 216-90-1218/3100.

B. Findings of the Board:

We have thoroughly reviewed the guidance and evidence provided by the recorder and counsel for the respondent. Clearly our decision must be based on the regulations and requirements of DOD instruction 1332.30 and CNO NAVADMIN 033/94.

In determining whether LTJG Selland violated DOD policy regarding homosexuality, the Board had to answer two questions:

1. Did the respondent make a statement which created a rebuttable presumption of homosexual conduct?

2. Did the respondent present evidence demonstrating that he does not engage in, attempt to engage in or have a propensity to engage in homosexual acts?

Further, we had to bear in mind, that the DOD policy states that the member bears the burden of proving by a preponderance of the evidence that he is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

While we acknowledge LTJG Selland's competence and dedication to the Navy, we did not believe the evidence submitted concerning them to be relevant to answering the questions stated above.

In addressing the first question, the Board finds that there is sufficient evidence to believe that the respondent did, in fact state he is a homosexual. A review of that evidence indicates that, although LTJG Selland had several opportunities to recant his statement to CDR Hasslinger (up to and including his unsworn statement), he

chose not to do so. In fact, the specific evidence (respondent's exhibit FF, recorder's exhibit 9, the testimonies of CDR Hasslinger and CAPT Brown, and LTJG Selland's own unsworn statement) clearly indicate that LTJG Selland wishes to publicly acknowledge his homosexuality.

The Board found the circumstances of LTJG Selland's statement to CDR Hasslinger troubling. We examined his assertion that his statement was made, at the urging of a Navy chaplain, in privacy, to his commanding officer, in order to stop wardroom harassment. We concluded that, as a naval officer, LTJG Selland should have realized that the burdens of command preclude a commanding officer from maintaining confidences with his subordinates in the matter of violations of regulations. Once informed by LTJG Selland of his homosexuality, CDR Hasslinger was compelled, by duty, to act on the knowledge. In the matter of easing wardroom harassment, LTJG Selland could have pursued alternative courses of action through the chain of command, which did not require his open declaration of homosexuality.

In considering the second question, the Board focused on CDR Hasslinger's testimony that LTJG Selland stated that he was involved in a monogamous homosexual relationship. Respondent's lack of rebuttal of this testimony in his unsworn statement provides the Board with sufficient evidence to believe that LTJG Selland did engage in homosexual acts. The Board looked for, and would have been receptive to, evidence that LTJG Selland does not intend to engage in future homosexual acts. That evidence was not forthcoming. The only piece of evidence which addressed respondent's future intentions was LTJG Selland's unsworn statement that he "will not engage in conduct that interferes with the military mission." Had LTJG Selland simply stated that he will not engage in future homosexual acts, the Board's deliberations may have followed a different course.

Lacking LTJG Selland's statement that he would refrain from future homosexual conduct, the Board considered the question of "propensity to engage in homosexual acts" by examining the documentary evidence submitted by the respondent. The Congressional Research Service report (respondent's exhibit CC) states that the distinctions between orientation and behavior are difficult to make. The board found this to be true in its deliberations. While DR Herek is quite emphatic, in his work, that admission of sexual orientation does not necessarily imply conduct, this assertion could also be stated that homosexual orientation may imply conduct. Once again, the Board searched for respondent's evidence to rebut the presumption of homosexual conduct, but could find none. Therefore the Board believes that the propensity for LTJG Selland to commit homosexual acts exists.

Accordingly, the Board finds by a vote of

3 to 0 The statements of LTJG Selland, are homosexual conduct within the meaning of paragraph 3 of CNO Message 010300Z Mar 94 (NAVADMIN 033/94) and the presumption of homosexual conduct thereby raised is not rebutted.

C. Recommendation of the Board:

By a vote of 3 to 0, the Board recommends that:

LTJG Selland has failed to show cause for retention in the Naval service and he should be separated with an Honorable Discharge.

/s/ Samuel A. Montgomery III
SAMUEL A. MONTGOMERY III
Capt, USN

/s/ Francis X. Poole
FRANCIS X. POOLE
Capt, SC, USN

/s/ Dale J. Feltes
DALE J. FELTES
Capt, SC, USN

Dissent, if any: None.

D. Authentication by senior member

/s/ Samuel A. Montgomery III
SAMUEL A. MONTGOMERY III
Capt, USN

E. Reviewed by legal counsel

/s/ James D. Secor
JAMES D. SECOR
Lt, JAGC, USNR

F. Reviewed by counsel for the respondent

/s/ [Illegible] for
JEFFREY C. GOOD
LCDR, USCG

APPENDIX F

THE CONSTITUTION OF THE UNITED STATES

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

APPENDIX G

ADMINISTRATIVE PROCEDURE ACT

5 U.S.C. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action.

The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

APPENDIX H

NATIONAL DEFENSE AUTHORIZATION ACT OF 1994

10 U.S.C. § 654. Policy concerning homosexuality in the armed forces

(a) FINDINGS.—Congress makes the following findings:

(1) Section 8 of article I of the Constitution of the United States commits exclusively to the Congress the powers to raise and support armies, provide and maintain a Navy, and make rules for the government and regulation of the land and naval forces.

(2) There is no constitutional right to serve in the armed forces.

(3) Pursuant to the powers conferred by section 8 of article I of the Constitution of the United States, it lies within the discretion of the Congress to establish qualifications for and conditions of service in the armed forces.

(4) The primary purpose of the armed forces is to prepare for and to prevail in combat should the need arise.

(5) The conduct of military operations requires members of the armed forces to make extraordinary sacrifices, including the ultimate sacrifice, in order to provide for the common defense.

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion, that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of the combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that—

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion, require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty.

(11) The pervasive application of the standards of conduct is necessary because members of the armed forces must be ready at all times for worldwide deployment to a combat environment.

(12) The worldwide deployment of United States military forces, the international responsibilities of the United States, and the potential for involvement of the armed forces in actual combat routinely make it necessary for members of the armed forces involuntarily to accept living conditions and working conditions that are often spartan, primitive, and characterized by forced intimacy with little or no privacy.

(13) The prohibition against homosexual conduct is a longstanding element of military law that continues to be necessary in the unique circumstances of military service.

(14) The armed forces must maintain personnel policies that exclude persons whose presence in the armed forces would create an unacceptable risk to the armed forces' high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(15) The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

(b) POLICY.—A member of the armed forces shall be separated from the armed forces under regulations prescribed by the Secretary of Defense if one or more of the following findings is made and approved in accordance with procedures set forth in such regulations:

(1) That the member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts unless there are further findings, made and approved in accordance with procedures set forth in such regulations, that the member has demonstrated that—

(A) such conduct is a departure from the member's usual and customary behavior;

(B) such conduct, under all the circumstances, is unlikely to recur;

(C) such conduct was not accomplished by use of force, coercion, or intimidation;

(D) under the particular circumstances of the case, the member's continued presence in the armed forces is consistent with the interests of the armed forces in proper discipline, good order, and morale; and

(E) the member does not have a propensity or intent to engage in homosexual acts.

(2) That the member has stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

(3) That the member has married or attempted to marry a person known to be of the same biological sex.

(c) ENTRY STANDARDS AND DOCUMENTS.—(1) The Secretary of Defense shall ensure that the standards for enlistment and appointment of members of the armed forces reflect the policies set forth in subsection (b).

(2) The documents used to effectuate the enlistment or appointment of a person as a member of the armed forces shall set forth the provisions of subsection (b).

(d) REQUIRED BRIEFINGS.—The briefings that members of the armed forecs receive upon entry into the armed forces and periodically thereafter under section 937 of this title (article 137 of the Uniform Code of Military Justice) shall include a detailed explanation of the applicable laws and regulations governing sexual conduct by members of the armed forces, including the policies prescribed under subsection (b).

(e) RULE OF CONSTRUCTION.—Nothing in subsection (b) shall be construed to require that a member of the armed forces be processed for separation from the armed forces when a determination is made in accordance with regulations prescribed by the Secretary of Defense that—

(1) the member engaged in conduct or made statements for the purpose of avoiding or terminating military service; and

(2) separation of the member would not be in the best interest of the armed forces.

(f) DEFINITIONS.—In this section:

(1) The term "homosexual" means a person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts, and includes the terms "gay" and "lesbian".

(2) The term "bisexual" means a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

(3) The term "homosexual act" means—

(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and

(B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A).

(Added Pub. L. 103-160, div. A, title V, § 571(a)(1), Nov. 30, 1993, 107 Stat. 1670.)

* * * *

IMPLEMENTATION OF SECTION; REGULATIONS; SAVINGS PROVISION; SENSE OF CONGRESS

Section 571(b)-(d) of Pub. L. 103-160 provides that:

"(b) REGULATIONS.—Not later than 90 days after the date of enactment of this Act [Nov. 30, 1993], the Secretary of Defense shall revise Department of Defense regulations, and issue such new regulations as may be necessary, to implement section 654 of title 10, United States Code, as added by subsection (a).

"(c) SAVINGS PROVISION.—Nothing in this section of section 654 of title 10, United States Code, as added by subsection (a), may be construed to invalidate any inquiry, investigation, administrative action or proceeding, courtmarital, or judicial proceeding conducted before the effective date of regulations issued by the Secretary of Defense to implement such section 654.

"(d) SENSE OF CONGRESS.—It is the sense of Congress that—

"(1) the suspension of questioning concerning homosexuality as part of the processing of individuals for accession into the Armed Forces under the interim policy of January 29, 1993, should be continued, but the Secretary of Defense may reinstate that questioning with such questions or such revised questions as he considers appropriate if the Secretary determines that it is necessary to do so in order to effectuate the policy set forth in section 654 of title 10, United States Code, as added by subsection (a); and

"(2) the Secretary of Defense should consider issuing guidance governing the circumstances under which members of the Armed Forces questioned about homosexuality for administrative purposes should be afforded warnings similar to the warnings under section 831(b) of title 10, United States Code (article 31(b) of the Uniform Code of Military Justice)."

APPENDIX I

Department of Defense
DIRECTIVE

December 21, 1993 #
NUMBER 1332.30

SUBJECT: Separation of Regular Commissioned Officers

References:

(a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," February 12, 1986 (hereby canceled)

(b) Chapter 60 and Sections 618, 630, 654, 827, and 831 of title 10, United States Code

(c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980

(d) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992

(e) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"

(f) DoD Instruction 5505.8, "Investigations of Sexual Misconduct by the Defense Criminal Investigative Organizations and Other DoD Law Enforcement Organizations," February 28, 1994

A. *REISSUANCE AND PURPOSE*

This Directive:

1. Reissues reference (a)

2. Implements Chapter 60 and Section 630 of reference (b) to update policy, responsibilities, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.

3. Implements Chapter 60 and Section 630 of reference (b) on the discharge of regular commissioned officers with less than 5 years active commisisoned service in certain circumstances.

B. *APPLICABILITY AND SCOPE*

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and to the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.

2. Applies to regular commissioned officers of the Military Services.

3. Does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.

[2]

C. *DEFINITIONS*

Terms used in this Directive are defined in enclosure 1.

D. *POLICY*

1. It is DoD policy to:

a. Promote the readiness of the Military Services by maintaining high standards of conduct and perform-

ance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

b. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline.

c. Separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

(1) Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

(2) Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

2. Notwithstanding any other provision of this Directive, the Secretaries of the Military Departments concerned may discharge regular commissioner officers with less than 5 years active commissioned service from a Military Service when there is a need to reduce the number of officers in that Service to meet budgetary or force size requirements. The provisions of Enclosure 6 do not apply to the discharge of probationary officers under this authority.

3. The Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)), in coordination with the Secretaries of the Military Departments, shall ensure that officers separated under this Directive are fully informed

of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. *RESPONSIBILITIES*

1. The *Assistant Secretary of Defense for Personnel and Readiness* shall supplement this Directive, as needed.

2. The *Secretaries of the Military Departments* shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

[3]

b. Ensure, through their military commanders, that the policies, standards and procedures of this Directive are applied consistently, that fact-finding inquiries are conducted properly, that no abuse of authority occurs, and that failure to follow the provisions of this Directive results in appropriate corrective action.

c. Address any recommendations for policy changes in this Directive to the ASD(P&R).

F. *PROCEDURES*

Procedures and standards for implementation of the policy in section D., above, are in enclosures 2 through 8.

G. *EFFECTIVE DATE AND IMPLEMENTATION*

1. This Directive is effective February 28, 1994.

2. This Directive applies only to administrative separation proceedings initiated on or after February 28, 1994, unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.

/s/ Les Aspin

Enclosures—8

1. Definitions
2. Reasons for Separation
3. Procedures for Nonprobationary Commissioned Officers
4. Composition of Boards
5. Board of Inquiry Procedures
6. Procedures for Certain Probationary Commissioned Officers
7. Character of Discharge
8. Guidelines for Fact-Finding Inquiries into Homosexual Conduct

[ENCLOSURE 1]

[1-1]

DEFINITIONS

1. *Active Commissioned Service.* Service on active duty as a commissioned officer in a grade above warrant officer. W-4.

2. *Bisexual.* A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

3. *Commissioned Officer.* An officer in any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer or retired commissioned officer.

4. *Convening Authority.* The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.

5. *Counsel.* A lawyer qualified under 10 U.S.C. 827 (b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.

6. *Drug Abuse.* As defined in DoD Directive 1010.4 (reference (c)).

7. *Homosexual.* A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

8. *Homosexual Act*

a. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and

b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in paragraph 8.a., above.

9. *Homosexual Conduct.* A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

10. *Legal Advisor.* A judge advocate qualified under 10 U.S.C. 827 (b)(1) (reference (b)) and appointed to assist a Board of Inquiry.

11. *Nonprobationary Commissioned Officer.* A commisioned officer other that [sic] a probationary commissioned officer.

12. *Probationary Commissioned Officer.* A Commissioned officer with less that [sic] 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period of 3 years from the date of his or her appointment as a regular commissioned officer.

13. *Propensity.* Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

14. *Respondent.* A commissioned officer required to show cause for retention on active duty.

15. *Separation.* Discharge, retirement, or resignation.

[1-2]

16. *Sexual Orientation.* An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

17. *Show-Cause Authority.* Any of the following as determined by the Secretary of the Military Department concerned.

a. Commanders exercising General Court Martial authority and all general or flag rank officers in command who have a judge advocate or legal advisor available.

b. The Secretary of the Military Department concerned or officers (not below the grade of major general or rear admiral) designated by the Secretaries of the Military Departments to determine, based on a record review, that an officer shall be required to show case [sic] for retention on active duty.

18. *Statement that a Member Is a Homosexual or Bisexual or Words to That Effect.* Language or behavior that a reasonble person would believe was intended to convey the statement that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

[ENCLOSURE 2]

[2-1]

REASONS FOR SEPARATION

A. *SUBSTANDARD PERFORMANCE OF DUTY*

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as com-

pared to other commisisoned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.

2. Efficiency.

3. Leadership.

4. Lack of response to training, in that performance of duties in the officer's assigned speciality is precluded or impaired to the degree of being unsatisfactory.

5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by military or civilian authorities.

2. Intentional or discreditable mismanagement of personal affairs, including financial affairs.

3. Drug abuse.

4. Intentional neglect of, or failure to perform, assigned duties or complete required training.

5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.

6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. *HOMOSEXUAL CONDUCT*

Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph C.1.b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages or in will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in section C.1.

[2-2]

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

(1) Such acts are a departure from the officer's usual and customary behavior;

(2) Such acts under all the circumstances are unlikely to recur;

(3) Such acts were not accomplished by use of force, coercion, or intimidation;

(4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and

(5) The officer does not have a propensity or intent to engage in homosexual acts.

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence demonstrating that he or she does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(1) Whether the officer has engaged in homosexual acts;

(2) The officer's credibility;

(3) Testimony from others about the officer's past conduct, character, and credibility;

(4) The nature and circumstances of the officer's statement;

(5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving throughout the proceedings, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in paragraphs C.1.a. and C.1.b. of this enclosure, above.

3. Nothing in this Directive or the Service implementing regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. *MULTIPLE REASONS*

A commissioned officer may be considered for separation under all the reasons in Sections A., B., C., and D. of this enclosure above; however, separate findings under each application section shall be required as to the reasons for separation.

[ENCLOSURE 3]

[3-1]

PROCEDURES FOR NONPROBATIONARY COMMISSIONED OFFICERS

A. *INITIATION OF ACTION*

The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations.

B. *SHOW-CAUSE AUTHORITY*

1. The show-cause authority will determine whether an officer shall be required to show cause for retention on active duty for one or more of the reasons listed in enclosure 2, and as further defined by the Secretary of the Military Department concerned.

2. The show-cause authority shall:

a. Evaluate all information presented concerning the case under consideration.

b. Determine whether the record is sufficient to require the officer to show cause for retention on active duty.

c. Under regulations prescribed by the Secretary concerned, close the case if the authority determines that the officer should not be required to show cause for retention on active duty.

d. Report the matter for referral to a Board of Inquiry if the authority determines that the officer should be required to show cause for retention on active duty. The reasons for making such a determination shall be provided to the officer in writing.

e. Refer the case to a Board of Inquiry if the record supports a finding of homosexual conduct under enclosure 2.

f. Consider the initiation of separation action if the record supports a finding of drug abuse under enclosure 2.

3. As provided in 10 U.S.C. 618(b)(2) (reference (b)), the Secretary concerned may require an officer to show cause for retention on active duty based upon the recommendation of a promotion selection board.

C. *BOARD OF INQUIRY*

1. *Composition.* See enclosure 4.

2. *Convening.* A Board of Inquiry shall be convened under such regulations as may be prescribed by the Secretary of the Military Department concerned.

3. *Function.* A Board of Inquiry shall give a fair and imparital hearing to a respondent. The Board of Inquiry is an administrative board that shall consider all relevant and material evidence pertaining to the case and shall

[3-2]

function under rules and procedures established by the Secretary of the Military Department concerned. The Board of Inquiry shall make findings of fact and a recommendation as to whether a respondent should be retained on active duty. The board also shall recommend the character of discharge in accordance with regulations prescribed by the Secretary of the Military Department concerned, if it recommends discharge. Its findings must be supported by a preponderance of the evidence. The proceedings and hearing before a Board of Inquiry are intended to give the officer an opportunity to respond to, and rebut, the basis for the contemplated change of status, after having been informed of the contemplated change and the reasons therefor. The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken.

4. *Determinations*

a. If a Board of Inquiry determines that the respondent's retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Inquiry determines that the respondent's retention on active duty is not warranted, it shall report the matter to a Board of Review, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

D. *BOARD OF REVIEW*

1. *Composition.* See enclosure 4.

2. *Convening.* A Board of Review shall be convened under such regulations prescribed by the Secretary of the Military Department concerned.

3. *Function.* After a Board of Inquiry has determined a respondent has failed to establish that retention on active duty is warranted, the Board of Review shall review the record for the purpose of examining the grounds for such determination.

4. *Determinations*

a. If a Board of Review determines that the respondent has established that retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Review determines that the respondent has failed to establish that retention on active duty is warranted, the Board of Review shall recommend to the Secretary of the Military Department concerned

that the respondent should be separated, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

[3-3]

E. *ACTION BY THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED UPON RECOMMENDATION OF THE BOARD OF REVIEW*

If the Board of Review recommends that the respondent not be retained on active duty, the Secretary of the Military Department concerned may direct:

1. Separation.
2. Retention.

The action of the Secretary is final.

F. *RETIREMENT OR DISHARGE*

1. *Retirement.* A commissioned officer separated from active duty in accordance with this Directive, if eligible for voluntary retirement under any provisions of law on the date of such separation, shall be retired in the grade and with the retired pay for which eligible if retired under such provision.

2. *Discharge.* A commissioned officer separated from active duty in accordance with this Directive, if ineligible for retirement under any provision of law on the date of such separation, shall be:

a. Honorably discharged in the grade then held if separated only for substandard performance of duty; or

b. Discharged in the grade then held if separated for misconduct, for moral or professional dereliction, homosexual conduct, or in the interest of national security. The character of discharge shall be determined by the Secretary of the Military Department concerned but

in no case shall it be more severe than that recommended by the Board of Inquiry.

G. *APPLICATION FOR RETIREMENT OR DISCHARGE*

At any time before final action in the case, the Secretary of the Military Department concerned may grant a request by the commissioned officer concerned for:

1. Voluntary retirement.
2. Discharge.

The action of the Secretary is final.

H. *LIMITATIONS*

1. A commissioned officer required to show cause for retention on active duty because of substandard performance of duty and who is retained on active duty by a Board of Inquiry or a Board of Review may not again be required to show cause for retention for the same reasons within the one-year period beginning on the date of the determination to retain.

2. Subject to paragraph H.3., below, a commissioned officer required to show cause for retention on active duty because of misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security, and who is retained on active duty by a Board of Inquiry or a Board of Review may again be required to show cause for retention at any time.

3. A commissioned officer may not again be required to show cause for retention on active duty solely because of conduct that was the subject of the previous proceedings, unless the findings and recommendations of the

Board of Inquiry or Board of Review that considered the case are determined to have been the result of fraud or collusion.

[ENCLOSURE 4]

[4-1]

COMPOSITION OF BOARDS

A. *COMPOSITION*

Each board convened in accordance with this Directive shall be composed of at least three commissioned officers having the qualifications prescribed by section B. of this enclosure. The senior member shall be the President of the Board. A nonvoting legal advisor may also be appointed to assist the Board of Inquiry.

B. *OFFICERS ELIGIBLE TO SERVE ON BOARDS*

1. Each commissioned officer who serves on a board must be an officer on the active duty list of the same Military Service as the respondent.

2. A commissioned officer may not serve on a board unless he or she is serving on active duty in a grade above lieutenant colonel or commander, and is senior in grade and rank to any respondent being considered by the board.

3. If qualified commissioned officers from the active duty list are not available in sufficient numbers to comprise a board, the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or commander and must be senior to the grade held by any respondent being considered by the board.

4. No person shall be a member of more than one board convened under this Directive to consider the same respondent.

[ENCLOSURE 5]

[5-1]

BOARD OF INQUIRY PROCEDURES

A. *CHALLENGES*

Under regulations prescribed by the Secretary of the Military Department concerned, board members are subject to challenge for cause only. In the event the membership of the board is reduced to less than three officers, the convening authority shall appoint additional members.

B. *LEGAL ADVISOR*

The legal advisor, if appointed, shall perform such functions as the Secretary of the Military Department concerned may prescribe except that the legal advisor has no authority to dismiss any allegation against the respondent or to terminate the proceedings.

C. *RECORDER*

The Government may be represented before the board by a recorder whose duties shall be prescribed by the Secretary of the Military Department concerned.

D. *RIGHTS OF A RESPONDENT REQUIRED TO SHOW CAUSE FOR RETENTION BEFORE A BOARD OF INQUIRY*

1. When the case is referred to a Board of Inquiry, the respondent shall be notified in writing, at least 30 days before the hearing, of the reasons for which he or she shall be required to show cause for retention on active duty and of the least favorable characterization of discharge for which the officer may be recommended.

2. The respondent shall be allowed a reasonable period of time, as determined by the Board of Inquiry, to prepare his or her showing of cause for retention on active duty.

3. The respondent may appear in person at all proceedings of the Board of Inquiry.

4. The respondent may be represented either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice (if the counsel of choice is determined to be reasonably available under regulations prescribed by the Secretary of the Military Department concerned), but not by both. The respondent may employ civilian counsel, at no expense to the Government, in which case no military counsel shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. [sic] The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall withhold any records that the Secretary of the Military Department concerned determines should be withheld in the interest of national security. When any records are withheld, the respondent shall be furnished, to the extent practicable, a summary of the records so withheld.

6. The respondent may request the appearance before the board of any witness whose testimony is considered to be pertinent to his or her case. A determination on the availability of the witness or whether the witness shall

be required to appear, and the materiality of the witness, shall be made pursuant to regulations of the Secretary of the Military Department concerned. Witnesses not on active duty must appear voluntarily and at no expense to the Government, except as otherwise authorized by the Secretary of the Military Department concerned.

7. Subject to regulations prescribed by the Secretary of the Military Department concerned, the respondent may submit, at any time before the board convenes or during the proceedings, documents from his or her record of service, letters, answers, depositions, sworn or unsworn statements, affidavits, certificates, or stipulations. These documents may include depositions of witnesses not deemed to be reasonably available or of witnesses unwilling to appear voluntarily.

8. The respondent may testify in his or her behalf subject to the provisions of 10 U.S.C. 831 (Article 31 of the Uniform Code of Military Justice) (reference (b)).

9. The respondent and his or her counsel may question any witness who appears before the board.

10. The respondent or counsel for the respondent may present oral or written argument, or both, on the matter to the board.

11. The respondent may, under regulations prescribed by the Secretary of the Military Department concerned, request a continuance, when necessary, for the preparation of his or her case before the board.

E. *BOARD DETERMINATION*

The Board of Inquiry shall decide the case on the evidence received or developed during open hearings. Voting shall be conducted in closed session with only voting members of the board in attendance. All findings and recommendations shall be determined by a majority vote.

F. *REPORT OF PROCEEDINGS*

The record of proceedings shall be kept in summarized form unless a verbatim record is required by the Show Cause Authority (SCA) or the Secretary of the Military Department concerned. In all cases, the findings and recommendations of the Board of Inquiry shall be stated in clear and concise language and shall be signed by all

members concurring. Those members not concurring in the findings or recommendations, or both, may file a statement of nonconcurrence, and the reasons therefor, for inclusion in the record. The respondent shall be provided a copy of the report of the proceedings and the findings and recommendation of the board and shall be provided an opportunity to submit written comments for consideration by the Board of Review. When the Board of Inquiry determines that retention on active duty is warranted, and the case is closed, a summarized report of the proceedings may be prepared pursuant to regulations prescribed by the Secretary of the Military Department concerned.

[ENCLOSURE 6]

[6-1]

PROCEDURES FOR CERTAIN PROBATIONARY COMMISSIONED OFFICERS

A. *INITIATION OF ACTION*

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.

2. That he or she may tender a resignation.

3. That he or she may submit a rebuttal or declination statement instead of a resignation.

4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. *PROCESSING*

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation, or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers or a Board of Inquiry, as de-

termined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. *FINAL DETERMINATION*

The Secretary of the Military Department concerned may direct:

1. Retention.

2. Discharge.

The action of the Secretary is final.

[ENCLOSURE 7]

[7-1]

CHARACTER OF DISCHARGE

A. *DISCHARGE FOR SUBSTANDARD PERFORMANCE OF DUTY*

A discharge shall be characterized as "honorable" when substandard performance of duty is the sole basis for the discharge.

B. *DISCHARGE FOR MISCONDUCT, OR FOR MORAL OR PROFESSIONAL DERELICTION, OR HOMOSEXUAL CONDUCT, OR IN THE INTERESTS OF NATIONAL SECURITY*

A discharge shall be characterized as "Honorable," "General (Under Honorable Conditions)", or "Under Other Than Honorable Conditions."

1. *Consideration.* The character of a discharge shall be predicated on the commissioned officer's behavior and performance of duty while a member of a Military Service. Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident. There are circumstances, however, in which conduct reflected by a single incident may provide the basis for characterization.

2. *Exceptions*

a. A discharge shall be characterized as "Honorable" when the graunds for discharge are based solely on pre-Service activities, other than intentional misrepresentation, or omission of facts, in obtaining an appointment or in official statements or records.

b. A discharge shall be characterized as "Honorable" or "Under Honorable Conditions" when the sole basis for separation is homosexual conduct unless aggravated acts are included in the findings. A separation

"Under Other Than Honorable Conditions" may be issued if there is a finding that the officer attempted, solicited, or committed a homosexual act:

(1) By using force, coercion, or intimidation.

(2) With a person under 16 years of age.

(3) With a subordinate in circumstances that violate the customary military superior-subordinate relationship.

(4) Openly in public view.

(5) For compensation.

(6) Aboard a military vessel or aircraft.

(7) In another location subject to military control under aggravating circumstances, noted in the finding, that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

[ENCLOSURE 8]

[8-1]

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. *RESPONSIBILITY*

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

5. The guidelines in this enclosure do not apply to activities of Defense Criminal Investigative Organizations and other DoD law enforcement organizations, which are governed by DoD Instruction 5505.8 (reference (f)).

B. *DEFINITIONS*

1. *Bisexual.* A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. *Commander.* A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

3. *Homosexual.* A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

4. *Homosexual Conduct.* "Homosexual conduct" is a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, handholding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person would believe (3) was intended to convey the statement (4) that a person engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts. This may include statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

[8-2]

d. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to en-

gage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

5. *Sexual Orientation.* An abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts.

C. *BASES FOR CONDUCTING INQUIRIES*

1. A commander will initiate an inquiry only if he or she has credible information that there is a basis for discharge. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that there is a basis for discharge. It requires a determination based on articulable facts, not just a belief or suspiction.

2. A basis for discharge exists if:

a. The member has engaged in a homosexual act.

b. The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or

c. The member has married or attempted to marry a person of the same sex.

3. Credible information does not exists, for example, when:

a. The individual is suspected of engaging in homosexual conduct, but there is no credible information, as described, to support that suspicion; or

b. The only information is the opinions of other that a member is homosexual; or

c. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or

d. The only information known is an associational activity such as going to a gay bar, possessing or reading

homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

4. Credible information exists, for example, when:

a. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or

b. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts; or

c. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe was intended to convey the statement that the member engages in, attempts to engage in, or has a propensity or intent to engage in homosexual acts.

[8-3]

E. *PROCEDURES*

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, whether a member is a heterosexual, a homosexual, or a bisexual. However, upon receipt of credible information of homosexual conduct (as described in section C, above) commanders or appointed inquiry officials may ask members if they engaged in such conduct. But the member should first be advised of the DoD policy on homosexual conduct (and rights under Article 31, USMJ, if applicable). Should the member choose not to discuss the matter further, the commander should consider other available information. Nothing in this provision precludes questioning a member about any information provided by the member in the course of the fact-finding inquiry or any related proceeding, nor does it provide the member with any basis for challenging the validity of any proceeding or the use of any evidence, including a statement by the member, in any proceeding.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. The Service member shall be given the opportunity to present evidence demonstrating that he or she does not engage in, attempt to engage in, or have a propensity or intent to engage in homosexual acts.

6. The Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, attempts to engage in, has a

propensity to engage in, or intends to engage in homosexual acts.

E. *LEGAL EFFECT*

The procedures in this enclosure create no substantive or procedural rights.

Supreme Court, U.S.
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No. 96-1238

In the Supreme Court of the United States

OCTOBER TERM, 1996

RICHARD DIRK SELLAND, PETITIONER

v.

WILLIAM S. COHEN, SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

The Act of Congress governing service by homosexuals in the military, 10 U.S.C. 654, requires separation of a member who, like petitioner, states that he is a homosexual and fails to rebut the presumption arising from that statement that he has engaged in, or has a propensity to engage in, homosexual acts. The question presented is whether that Act and petitioner's discharge under it are consistent with equal protection, the First Amendment, due process, and the Administrative Procedure Act.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	6
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Able v. *United States*, 88 F.3d 1280 (2d Cir. 1996)	8, 10, 11
Ben-Shalom v. *Marsh*, 881 F.2d 454 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990)	10, 11
Branti v. *Finkel*, 445 U.S. 507 (1980)	9
Brown v. *Glines*, 444 U.S. 348 (1980)	8
Goldman v. *Weinberger*, 475 U.S. 503 (1986)	7
Heller v. *Doe*, 509 U.S. 312 (1993)	8
High Tech Gays v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563 (9th Cir. 1990)	11
Holmes v. *California Army Nat'l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), appeals pending, Nos. 96-15726 & 96-15855 (9th Cir.)	10
Meinhold v. *Department of Defense*, 34 F.3d 1469 (9th Cir. 1994)	10
Philips v. *Perry*, No. 95-35293 (9th Cir. Feb. 14, 1997)	8, 10
Pruitt v. *Cheney*, 963 F.2d 1160 (9th Cir. 1991), cert. denied, 506 U.S. 1020 (1992)	11
Rich v. *Secretary of the Army*, 735 F.2d 1220 (10th Cir. 1994)	10, 11
Richenberg v. *Perry*, 97 F.3d 256 (8th Cir. 1996)	8, 9-10
Romer v. *Evans*, 116 S. Ct. 1620 (1996)	8
Rostker v. *Goldberg*, 453 U.S. 57 (1981)	7

Cases—Continued: Page

Schowengerdt v. *United States*, 944 F.2d 483 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992) 11
Selland v. *Aspin*, 832 F. Supp. 12 (D.D.C. 1993) 4-5
Steffan v. *Perry*, 41 F.3d 677 (D.C. Cir. 1994) 10
Thomasson v. *Perry*, 80 F.3d 915 (4th Cir.), cert. denied, 117 S. Ct. 358 (1996) 2, 5, 6, 7, 8
Watson v. *Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996), appeal pending, No. 96-35314 (9th Cir.) 10
Wayte v. *United States*, 470 U.S. 598 (1985) 8
Woodward v. *United States*, 871 F.2d 1068 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990) 10

Constitution and statutes:

U.S. Const.:
Amend. I 6, 10, 11
Amend. V (Due Process Clause) 6, 10
Administrative Procedure Act, 5 U.S.C. 551 *et seq.* ... 6, 10
10 U.S.C. 654 ..... 2, 5, 6, 8, 9
10 U.S.C. 654(a) 9
10 U.S.C. 654(a)(13) 2
10 U.S.C. 654(a)(15) 2
10 U.S.C. 654(b)(1)-(3) 2-3
10 U.S.C. 654(b)(2) 3
10 U.S.C. 654(f)(3) 3

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-2a) is unpublished, but the decision is noted at 100 F.3d 950 (Table). The opinion of the district court (Pet. App. 3a-16a) is reported at 905 F. Supp. 260.

JURISDICTION

The judgment of the court of appeals was entered on November 7, 1996. The petition for a writ of certiorari was filed on February 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Act of Congress governing military service by homosexuals, 10 U.S.C. 654 (Pet. App. 108a-113a), is discussed in detail in our brief in opposition in *Thomasson* v. *Perry*, No. 96-1, in which this Court denied certiorari on October 21, 1996. 117 S. Ct. 358.[1] Congress found that the longstanding "prohibition against homosexual conduct * * * continues to be necessary in the unique circumstances of military service." 10 U.S.C. 654(a)(13). Congress also determined (10 U.S.C. 654(a)(15)):

> The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability.

Accordingly, the Act provides for separation from service if a member has: (1) "engaged in, attempted to engage in, or solicited another to engage in a homosexual act"; (2) "stated that he or she is a homosexual or bisexual, or words to that effect, unless there is a further finding, made and approved in accordance with procedures set forth in the regulations, that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts"; or (3) "married or attempted to

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[1] We have furnished counsel for petitioner with a copy of our brief in opposition in *Thomasson*.

marry a person known to be of the same biological sex." 10 U.S.C. 654(b)(1)-(3).[2]

2. Pursuant to statutory provisions for the issuance of implementing regulations and procedures, the Department of Defense promulgated several directives to govern separations under the Act. DoD Directive 1332.30 (Pet. App. 114a-144a), applicable to officers, governs this case, and a substantially similar directive, DoD Directive 1332.14, applies to enlisted personnel. To implement the "statements" provision of the Act (10 U.S.C. 654(b)(2)), DoD Directive 1332.30 provides that a statement by an officer that he "is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts." DoD Dir. 1332.30 (Encl. 2) ¶ C.1.b; Pet. App. 123a. The officer is "given the opportunity to rebut the presumption by presenting evidence" to an administrative board "demonstrating that he * * * does not engage in, attempt to engage in, have a propensity to engage in or intend to engage in homosexual acts." *Ibid.*

A "[p]ropensity to engage in homosexual acts" is defined as "more than an abstract preference or desire to engage in homosexual acts; it indicates a *likelihood* that a person engages in or will engage in homosexual acts." DoD Dir. 1332.30 (Encl. 8) ¶ B.4.d;

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[2] The Act defines "homosexual act" as "(A) any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires; and (B) any bodily contact which a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subparagraph (A)." 10 U.S.C. 654(f)(3).

Pet. App. 140a-141a (emphasis added). By contrast, sexual orientation—defined as "[a]n abstract sexual preference for persons of a particular sex, as distinct from a propensity or intent to engage in sexual acts" (DoD Dir. 1332.30 (Encl. 8) ¶ B.5; Pet. App. 141a)—"is considered a personal and private matter, and is not a bar to continued service * * * unless manifested by homosexual conduct." DoD Dir. 1332.30 (Encl. 2) ¶ C; Pet. App. 122a.[3] An officer's statement that he is a homosexual "is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts." *Ibid.* The Directive also sets forth the types of evidence an officer may offer to rebut the presumption. DoD Dir. 1332.30 (Encl. 2) ¶ C.1.b; Pet. App. 123a.

3. Petitioner, then a lieutenant in the Navy, was assigned to a nuclear submarine. Pet. App. 5a. After crew members joked about his homosexuality, petitioner consulted a Navy chaplain. *Ibid.* Petitioner and the chaplain then met with petitioner's commander, and petitioner stated that he was homosexual and involved in a monogamous homosexual relationship. *Ibid.*

Based upon his statement, the Navy instituted a separation proceeding against petitioner. Pet. App. 5a.[4] At the hearing conducted by an administrative

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[3] "Homosexual conduct" is defined by the Directive as "a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage." DoD Dir. 1332.30 (Encl. 8) ¶ B.4; Pet. App. 140a.

[4] Petitioner secured a preliminary injunction barring his separation pursuant to the former policy regarding military service by homosexuals. *Selland* v. *Aspin*, 832 F. Supp. 12

board of inquiry, petitioner introduced evidence of his contribution to the Navy, but he did not attempt to rebut the presumption of homosexual acts that arose from his statement, and he did not deny an intent to engage in future homosexual acts. *Id.* at 6a.

The board found that petitioner had stated to his commander that he is homosexual and had made other public statements to that effect. Pet. App. 102a-103a. The board also found that petitioner had not rebutted the presumption, arising from those statements, that he had engaged in homosexual acts in the past and would engage in such acts in the future. *Id.* at 103a-104a. Based upon those findings, the board recommended that petitioner be separated with an honorable discharge. *Id.* at 104a. That recommendation was reviewed and approved by the Deputy Chief of Naval Personnel and an Assistant Secretary of the Navy. *Id.* at 95a-98a.

4. Petitioner then brought this action seeking declaratory and injunctive relief to prevent his discharge. After initially issuing a preliminary injunction (see Pet. App. 6a), the district court granted summary judgment for the government, holding that 10 U.S.C. 654 is valid. Pet. App. 3a-16a.

The Fourth Circuit affirmed in an unpublished per curiam decision. Pet. App. 1a-2a. It held that its *en banc* decision in *Thomasson* v. *Perry*, 80 F.3d 915 (4th Cir.), cert. denied, 117 S. Ct. 358 (1996) (Pet. App. 17a-94a), which had been issued while petitioner's appeal was pending, was dispositive of this case.

(D.D.C. 1993). That suit was dismissed by stipulation after the current Act became effective. Pet. 5. The Navy then proceeded against petitioner under the new Act.

ARGUMENT

Petitioner does not contend that the issues that he raises are distinguishable from those decided by the Fourth Circuit in *Thomasson*. The decision in *Thomasson* is correct and in accord with the decisions of the three other courts of appeals that have considered the validity of the statutory policy regarding military service by homosexuals. This Court recently denied certiorari in *Thomasson*, and there has been no change in circumstances that would warrant a different result here. Accordingly, further review is not warranted.

1. In *Thomasson*, as here, a Navy lieutenant was discharged under 10 U.S.C. 654 based upon his statement that he is a homosexual. Both officers argued that the governing statute violated equal protection, the First Amendment, due process, and the Administrative Procedure Act (APA).[5] The *en banc* Fourth Circuit correctly rejected those challenges in *Thomasson*, and the panel below properly held that it was bound by that decision.

Petitioner first argues that the court of appeals abdicated its role to review the constitutional issues. Pet. 14. In *Thomasson*, however, the court of appeals fully and carefully considered all issues raised (80 F.3d at 927-934; Pet. App. 35a-49a), although it properly recognized (80 F.3d at 921-927; Pet. App. 22a-35a) that this Court's precedents require great deference

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[5] Petitioner initially raised an argument, not presented in *Thomasson*, that one member of his Navy board of inquiry should have been removed from the board for bias. The district court rejected that claim (Pet. App. 14a), and the court of appeals granted petitioner's consented motion to dismiss that claim. Petitioner does not reassert that claim in this Court.

both to the constitutional authority of Congress and the Executive over military affairs and to the considered professional judgment of military officials with respect to personnel policies. See, *e.g.*, *Rostker* v. *Goldberg*, 453 U.S. 57, 64-72 (1981); *Goldman* v. *Weinberger*, 475 U.S. 503, 508-509 (1986).

In arguing that the Act violates equal protection, petitioner erroneously contends that it "targets homosexuals for discharge from the military, based solely on their status." Pet. 16. As the discussion above shows (see pages 3-4, *supra*), and as the *Thomasson* court held, the Act classifies on the basis of "service members who engage in or have a propensity to engage in homosexual acts." 80 F.3d at 928; Pet. App. 36a. The *Thomasson* court correctly held that the Act represents "a legitimate legislative choice," based upon Congress's and the military's assessment of the need for unit cohesion, privacy concerns, and the strong interest in minimizing sexual tensions and attractions "in the unique circumstances of military service." 80 F.3d at 928, 929; Pet. App. 37a-38a, 38a-39a (quoting 10 U.S.C. 654(a)(13)). The court further held that "it is legitimate for Congress to proscribe homosexual acts" and also "to seek to * * * *prevent* the commission of such acts" by means of the "statements" provision of the policy. 80 F.3d at 929; Pet. App. 39a. The presumption that a service member who states that he is a homosexual has "a propensity or intent to engage in homosexual acts" was correctly held in *Thomasson* to have "a rational factual basis" and to be legally permissible. 80 F.3d at 930; Pet. App. 40a. The court noted that the rational-basis standard allows (1) "'an imperfect fit between means and ends,'" (2) "general employment policies to prevent unsatisfactory conduct," and (3) "a

reasonable means of allocating the burden of proof." 80 F.3d at 930; Pet. App. 41a (quoting *Heller* v. *Doe*, 509 U.S. 312, 321 (1993)). Finding that the Act serves legitimate purposes, the *Thomasson* court properly rejected the claim, made by petitioner here (Pet. 14-16), that the Act is based upon prejudice against homosexuals. 80 F.3d at 927; Pet. App. 35a. Accord, *Richenberg* v. *Perry*, 97 F.3d 256, 261 (8th Cir. 1996); *Philips* v. *Perry*, No. 95-35293 (9th Cir. Feb. 14, 1997), slip op. 1430-1433; see *Thomasson* Br. in Opp. at 13-16.[6]

2. Petitioner also errs in arguing that the Act violates the First Amendment. Pet. 21-22. As the Fourth Circuit correctly held in *Thomasson* (80 F.3d at 931-934; Pet. App. 42a-48a), the Act treats a service member's statement of homosexual orientation as a basis from which to presume, in the absence of rebuttal by him, that he engages in, or is likely to engage in, homosexual acts. The First Amendment does not prohibit such evidentiary use of a member's statement. *Philips* v. *Perry*, slip op. 1434; *Richenberg* v. *Perry*, 97 F.3d at 262-263; *Able* v. *United States*, 88 F.3d 1280, 1292-1300 (2d Cir. 1996). See *Wayte* v. *United States*, 470 U.S. 598 (1985). In addition, expressive conduct may be restricted in the military context if it is "likely to interfere with * * * vital prerequisites for military effectiveness." *Brown* v. *Glines*, 444 U.S. 348, 354 (1980). The express legislative findings supporting the statutory provision at issue here (see 10 U.S.C. 654(a); Pet. App. 108a-110a) show that that test is met.

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[6] Our brief in opposition in *Thomasson* (at 16-18) also demonstrated that *Romer* v. *Evans*, 116 S. Ct. 1620 (1996), upon which petitioner relies (Pet. 16), does not cast doubt upon the validity of 10 U.S.C. 654.

3. Petitioner also errs in contending that proceedings under the Act violate due process and the APA because the rebuttable presumption "is a[n] illusory standard that cannot be satisfied." Pet. 22. Petitioner was afforded a full and fair opportunity at his administrative hearing to rebut the presumption that he had engaged in or was likely to engage in homosexual acts. In finding that he failed to rebut that presumption, the board relied upon petitioner's own statement that he is involved in a monogamous homosexual relationship and his failure to state that he does not intend to engage in future homosexual acts. Pet. App. 103a.[7] Thus, the board's finding that petitioner did not rebut the presumption is amply supported, as the district court concluded. *Id.* at 14a. That fact-bound determination, which both lower courts have sustained, does not warrant review by this Court. See *Branti* v. *Finkel*, 445 U.S. 507, 512 n.6 (1980).

4. Contrary to petitioner's argument (Pet. 11-13), the decisions of the court below in this case and in *Thomasson* are in accord with the decisions of the three other courts of appeals that have considered the validity of 10 U.S.C. 654. *Richenberg* v. *Perry*, 97 F.3d 256 (8th Cir. 1996), sustained a discharge under the Act against equal protection, First Amendment,

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[7] The board expressed concern that petitioner's initial statement that he was a homosexual was made in the context of a private meeting with his commander. Pet. App. 103a. The board determined, however, that "as a naval officer, [petitioner] should have realized" that his commander would be "compelled, by duty, to act" when a violation of a military regulation was brought to his attention. *Ibid.* No statement that petitioner made to the Navy chaplain was a basis for his discharge. See *id.* at 95a-105a.

due process, and APA challenges similar to those petitioner asserts. *Able* v. *United States*, 88 F.3d 1280 (2d Cir. 1996), rejected a First Amendment challenge to the Act, although the Second Circuit conditioned its holding upon a determination that the Act's prohibition of homosexual acts is valid, and it remanded for resolution of that issue. *Philips* v. *Perry*, No. 95-35293 (9th Cir. Feb. 14, 1997), sustained the Act against equal protection and First Amendment challenges advanced by a service member who stated that he was homosexual and had engaged in homosexual acts in the past and would continue to do so in the future.[8] In view of the consistent decisions of four courts of appeals sustaining the current Act—and those of four additional courts of appeals (the D.C., Federal, Seventh, and Tenth Circuits) sustaining the substantially similar discharge standards of the former policy[9]—certiorari is not warranted.

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[8] Two other cases challenging the "statements" portion of the Act are now pending before the Ninth Circuit. *Watson* v. *Perry*, 918 F. Supp. 1403 (W.D. Wash. 1996), appeal pending, No. 96-35314 (argued July 8, 1996); *Holmes* v. *California Army Nat'l Guard*, 920 F. Supp. 1510 (N.D. Cal. 1996), appeals pending, Nos. 96-15726 & 96-15855 (argued July 8, 1996).

[9] Five courts of appeals rejected equal protection challenges. *Steffan* v. *Perry*, 41 F.3d 677, 695 (D.C. Cir. 1994) (en banc); *Meinhold* v. *Department of Defense*, 34 F.3d 1469, 1479 (9th Cir. 1994); *Ben-Shalom* v. *Marsh*, 881 F.2d 454, 463-466 (7th Cir. 1989), cert. denied, 494 U.S. 1004 (1990); *Woodward* v. *United States*, 871 F.2d 1068, 1075-1076 (Fed. Cir. 1989), cert. denied, 494 U.S. 1003 (1990); *Rich* v. *Secretary of the Army*, 735 F.2d 1220, 1229 (10th Cir. 1984). The Ninth Circuit sustained the former policy in *Meinhold* but construed it in a unique, narrow, and at in our view erroneous manner. See *Thomasson* Br. in Opp. at 21 n.10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1997

Three courts of appeals rejected First Amendment challenges. *Pruitt* v. *Cheney*, 963 F.2d 1160, 1163-1164 (9th Cir. 1991), cert. denied, 506 U.S. 1020 (1992); *Schowengerdt* v. *United States*, 944 F.2d 483, 489 (9th Cir. 1991), cert. denied, 503 U.S. 951 (1992); *Ben-Shalom* v. *Marsh*, 881 F.2d at 458-462; *Rich* v. *Secretary of the Army*, 735 F.2d at 1228-1229. See also *High Tech Gays* v. *Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 578-580 (9th Cir. 1990).

Although the new Act differs from the former policy in other respects, the standards for discharge are substantially similar. See *Able* v. *United States*, 88 F.3d at 1286-1287.